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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

RUSKIN HARDWARE, INC., SINGER JEWELRY, INC., SAMUEL R. SCARCELLO AND THE DRUG STORE, INC.,
Petitioners,

vs.

FLEMING COMPANIES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in reviewing a dismissal on the pleadings of an antitrust Complaint by failing to recognize that within a well defined broad product market there can also exist well defined submarkets in determining petitioners' standing to sue. *Brown Shoe Co. v. United States,* 370 U.S. 294, 82 S.Ct. 1502, 1523-4 (1962).

II. Did the Court of Appeals err in reviewing the dismissal of tort Complaints on a motion for summary judgment by failing to consider the anticompetitive nature of defendant's conduct in determining the justification thereof whether petitioners did or did not have standing to sue for violation of Federal or State antitrust statutes. *Briner Electric Co. v. Sachs Electric Company,* 680 S.W.2d 737, 741 (Mo. App. 1984).

PARTIES TO THE PROCEEDINGS

Four Petitioners, Plaintiffs in the District Court:

Ruskin Hardware, Inc. d/b/a Ruskin Sentry Hardware - Louis Angotti, Jr.

Singer Jewelry, Inc. d/b/a Singer Jewelry - Morton and Helen Singer

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Samuel R. Scarcello d/b/a Ruskin Heights Barber Shop

The Drug Store, Inc. d/b/a The Drug Store - Robert Smith

Hereinafter referred to as *"Plaintiffs"*.

Sole Respondent, Defendant in the District Court:

Fleming Companies, Inc.

Hereinafter referred to as *"Defendant"*.

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OPINIONS BELOW

The opinions of the District Court and the Court of Appeals are set forth in full in Petitioners' Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

This case involves Sections 1 and 2 of the Sherman Act and Sections 4 and 16 of the Clayton Act, 15 U.S.C. Sections 1, 2, 15 and 26. These statutes are reprinted in pertinent part in the Petitioners' Appendix.

FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The jurisdiction of the trial court, the United States District Court for the Western District of Missouri, is based upon 15 U.S.C. Sections 4 and 26, which invest the several District Courts of the United States with jurisdiction to prevent and restrain violations of 15 U.S.C. Sections 1 and 2.

STATEMENT OF THE CASE

This case presents in sharp focus the most important legal issue in private antitrust litigation: The right of a private party to sue under Sections 4 and 16 of the Clayton Act for violations of Sections 1 and 2 of the Sherman Act. The court's attention is directed to three Supreme Court decisions which apply the appropriate tests for standing. These are: *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977); *Blue Shield of Virginia v. McCleary*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982); *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519,

103 S.Ct. 897, 74 L.Ed.2d 723 (1983). The holding of these cases clearly indicates that submarkets are not a basis for the disregard of a broader line of commerce that has economic significance. *See, e.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 326, 82 S.Ct. 1502, 1524, 8 L.Ed.2d 510 (1962).

A. Procedural History

Case Number 86-0161-CV-W-6 was filed in the United States District Court, Western District of Missouri, Western Division on February 6, 1987. The Complaint consisted of two counts alleging violation of Sections 1 and 2 of the Sherman Act.

Case Number 86-0371-CV-W-6 was originally filed in the Circuit Court of Clay County, Missouri on February 6, 1987.

The Petition consisted of four counts. Counts I and II alleged violations of the Missouri Anti-Trust Laws; Counts III and IV alleged Tortious Interference and Prima Facie Tort, respectively. That Petition was transferred to the Court on the ground of diversity on April 5, 1986.

The Defendant was charged with violation of the Sherman Anti-Trust Act, 15 U.S.C. Section 1, et seq. in case numbers 86-0161-CV-W-6 and 86-0371-CV-W-6 and with violation of Sections 416.011 through 416.161, Revised Statutes of Missouri, of the Missouri Anti-Trust Law. The latter suit, case number 86-0371-CV-W-6, also charged defendant with Tortious Interference under Count III and Prima Facie Tort under Count IV. The State Court action in case number 86-0371-CV-W-6 was removed

to the Federal District Court from the Circuit Court of Clay County, Missouri, on the basis of diversity of citizenship and consolidated with the federal suit on April 5, 1986.

On May 7, 1986 the District Court sustained a Motion to Dismiss Counts I and II of case number 86-0161-CV-W-6 and Counts I and II of case number 86-0371-CV-W-6, the antitrust counts, on the ground that plaintiffs lacked standing.

On October 13, 1986, defendant filed its Motion for Summary Judgment for the Tort Counts. (Counts III and IV of case number 86-0371-CV-W-6).

On March 8, 1987 defendant and plaintiffs submitted to the District Court lists of all witnesses and exhibits they planned to use at the trial. These lists of witnesses and exhibits so submitted to the District Court were in compliance with the District Court's Order of July 14, 1986.

On April 9, 1987, pursuant to the District Court's Order of July 14, 1986, attorneys for defendant and plaintiffs met and began jointly to prepare a pre-trial brief in this matter. On April 14, 1987 the parties informed the Court that the pre-trial brief, whose terms had been agreed upon was in composition and requested an extension of submission to the Court to May 15, 1987.

On April 27, 1987, the District Court halted further preparation of the pre-trial Brief. On that date the District Court sustained a Motion for Summary Judgment on Counts III and IV of case number 86-0371-CV-W-6,

Tortious Interference and Prima Facie Tort, respectively, on the ground that plaintiffs failed to produce evidence of absence of justification for defendant's conduct.

On May 22, 1987, plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit.

This was an appeal from a Final Order of Dismissal by the Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri entered on April 27, 1987.

Jurisdiction of the Appellate Court was invoked pursuant to Title 28 U.S.C. Section 1291. Plaintiffs' appeal was timely filed on May 22, 1987 from the Court's Judgment Order entered on April 27, 1987.

These consolidated cases were before the Appellate Court to review the District Court's sustaining of the Motion to Dismiss and the Motion for Summary Judgment and Final Order dismissing the consolidated cases in the District Court.

On June 16, 1988, the Court of Appeals for the Eighth Circuit affirmed the Final Order of Dismissal of this matter by the Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri entered on April 27, 1987. Briefly stated the Court of Appeals in a per curiam opinion held that tenants of a shopping center did not suffer antitrust injury as a result of an anchor grocery store lease assignee's closing the anchor store and directing customers to a competing store in another center for which the assignee was a supplier. The complained-of activities occurred in the grocery market, in which the complaining tenants did not compete.

Rejected was a relevant market for the attraction of consumers.

The Appellate Court stated that:

> "The plaintiffs try to distinguish *Henke Enterprises, Inc.* by arguing the relevant market here was the 'attraction of consumers.' The plaintiffs, however, refer to no persuasive authority to support this broad definition of the relevant market. In addition, if this court were to accept the plaintiffs' market definition, we would expand the scope of the private antitrust action far beyond its intended bounds. A private antitrust action is not available to remedy every injury suffered by a player in the general economy. *See Associated Gen. Contractors,* 459 U.S. at 535-36. Rather, to maintain a private antitrust action, a party's claimed injury must be sufficiently linked to the precompetitive policies underlying the antitrust laws. *See Henke Enterprises, Inc.,* 749 F.2d at 490; *see also id.* at 489.
>
> As in *Henke Enterprises, Inc.,* the plaintiffs have not suffered an antitrust-type injury and thus do not have standing to sue under the federal antitrust laws. *Id.* at 489-90; *see Midwest Communications, Inc. v. Minnesota Twins, Inc.,* 779 F.2d 444, 450 n.6 (8th Cir. 1985), *cert. denied,* 476 U.S. 1163 (1986); *see also General Indus. Corp. v. Hartz Mountain Corp.,* 810 F.2d 795, 809 (8th Cir. 1987). Further, we agree with the district court that the plaintiffs also lack standing to sue on their state antitrust claims. *See* Mo. Ann. Stat. §416.141.

We now turn to the summary judgment issue. After reviewing the record and the applicable legal

principles, we conclude the district court properly granted summary judgment in favor of the defendant on the plaintiffs' state tort claims. *See Celotex Corp.*, 477 U.S. at 322-23.

The district court's decisions are well reasoned. We affirm. *See* 8th Cir. R. 14."

The District Court ruling to which the Court of Appeals referred read as follows:

"Plaintiffs here attempt to distinguish *Henke* on the basis that, in the present suit, the defendant did not relocate to another location but simply closed operations altogether at the Ruskin Heights Shopping Center. This factual distinction, however, has no bearing on the relationship of the injuries suffered by the tenants to the allegedly anticompetitive activities of the defendant in keeping the anchor location closed. As in *Henke*, plaintiffs in the present case are not competitors, participants, or consumers within the grocery business. 'The only significant connection' between the plaintiff-tenants and the former A&P store 'was one of proximity.' *Henke*, 749 F.2d at 490."

It is of note that this opinion by the District Court was rendered before Respondent-Defendant even answered. The District Court ruling therefore was based solely on Plaintiffs' Complaint.

The other District Court Decision to which the Court of Appeals referred was rendered on April 27, 1987. It read (in pertinent part):

"Although the court has serious doubts about other elements of plaintiffs' case, it will address only the issue of justification, since the failure of the action

as to this element alone spells failure for the entire theory."

B. Statement of Facts

For many years before March, 1982, two local shopping centers, Ruskin and Longview (see Appendix Petitioners-Plaintiffs' Complaint; Petition for definition of terms) within four city blocks of each other, competed for consumer traffic.

Ruskin Heights Shopping Center is a local shopping center located on Blue Ridge Boulevard at 111th Street within the relevant geographic market. It is comprised of an "anchor" or "magnet" tenant and secondary and ancillary retail businesses, including businesses of Petitioners-Plaintiffs. Access to space to conduct an operating "Anchor" or "Magnet" tenant is an "Essential Facility".

Longview Shopping Center is a local shopping center located on the southeast corner of Blue Ridge Boulevard and Longview Road within the relevant geographic market. It is comprised of an "anchor" or "magnet" tenant and secondary and ancillary retail businesses.

These two local shopping centers are within four city blocks of each other and compete for retail customers of local shopping center cluster goods and services. A substantial quantity of said goods move in interstate commerce from outside the State of Missouri into the State of Missouri and are substantially affected by the competition between the two said local shopping centers.

The magnet tenant in each was a grocer; A&P in Ruskin and United Super in Longview. They were competitors. Respondent-Defendant had no dealing with A&P in Ruskin, but was the principal supplier of food and related items to the United Super store in Longview. In 1982,

Respondent-Defendant acquired all of the A&P stores in the Kansas City area as a package which included the A&P store in Ruskin. Respondent-Defendant concluded they would deal with only one of the stores and chose United Super in Longview instead of Ruskin. The lease of A&P in Ruskin, which was assigned to Respondent-Defendant, did not require it to operate in Ruskin but only to make the lease payments of $62,000 annually. As a result of Respondent-Defendant's conduct there has not been a magnet tenant in Ruskin since March 1982 although there have been opportunities for Respondent-Defendant to sublease to an operating magnet tenant to whom Respondent-Defendant would not be obligated to supply food and related items and who would relieve Respondent-Defendant of the $62,000 annual lease payments. In addition, there was an offer from the Lessor to pay Respondent-Defendant $150,000 if it would agree to cancel the lease. Despite these opportunities, Respondent-Defendant refused to allow another magnet tenant to use the facilities. The Petitioners-Plaintiffs in this matter are the tenants of the Ruskin Center whose businesses were damaged by the refusal of the Respondent-Defendant to allow a competing magnet tenant at Ruskin.

Respondent-Defendant at all times concerned herein, sold products at wholesale to the anchor or magnet tenant of the Longview Shopping Center for resale to consumers in the Longview Shopping Center.

Ruskin Heights Associates, a general partnership, since on or about January 8, 1982, has been the owner of the Ruskin Heights Shopping Center.

Since on or around May 11, 1979, the Great Atlantic and Pacific Tea Company ("A&P") has leased premises within the Ruskin Heights Shopping Center for the purpose of operating an anchor or magnet business and did

so operate until on or about March 1, 1982. The lease provided for a term of ten years ending November 30, 1989.

Pursuant to Ruskin Heights Associates' purchase of the Ruskin Heights Shopping Center, the lease dated May 11, 1979, with A&P was assigned to Ruskin Heights Associates.

In the Spring of 1982, Respondent-Defendant assumed the operation of the anchor or magnet tenant in the Ruskin Heights Shopping Center.

Pursuant to Respondent-Defendant's assumption of the operations of the anchor or magnet tenant in the Ruskin Heights Shopping Center, "A&P" assigned to Respondent-Defendant its lease with Ruskin Heights Associates. Thereby Respondent-Defendant acquired monopoly and economic power in the relevant product and geographic market by control of the essential facility in the Ruskin Heights Shopping Center.

Respondent-Defendant, among other things, has since on or about March 1, 1982, done the following:

a. Ceased operation as the anchor or magnet tenant in the Ruskin Heights Shopping Center.

b. Placed a sign on the closed anchor or magnet retail facility in the Ruskin Heights Shopping Center directing customers to the Longview Shopping Center; and

c. Refused to deal or negotiate with potential candidates to assume operation of the closed essential, anchor or magnet retail facility in the Ruskin Heights Shopping Center.

This is the gist of this case. It is not that Respondent-Defendant having the choice of two locations, chose one over the other. It is that Defendant-Respondent affirmatively blocked the use of the Ruskin Heights facility.

REASONS FOR GRANTING THE WRIT

The error of the Court of Appeals and District Court below has been addressed by this Court in *United States v. Phillipsburg National Bank and Trust Co.*, 399 U.S. 350, 360-1, 90 S.Ct. 2035, 2041-2042 (1970).

> "The District Court erred. It is true, of course, that the relevant product market is determined by the nature of the commercial entities involved and by the nature of the competition that they face. *See, e.g., United States v. Continental Can Co.*, 378 U.S. 441, 456-457, 84 S. Ct. 1738, 1746-1747, 12 L.Ed.2d 953 (1964). Submarkets such as the District Court defined would be clearly relevant, for example, in analyzing the effect on competition of a merger between a commercial bank and another type of financial institution. But submarkets are not a basis for the disregard of a broader line of commerce that has economic significance. *See, e.g., Brown Shoe Co. v. United States,* 370 U.S. 294, 326, 82 S. Ct. 1502, 1524, 8 L.Ed.2d 510 (1962)."

The District Court and the Court of Appeals focused upon a submarket, groceries, and disregarded a broader line of commerce that has economic significance, a cluster of goods and services. *See also, United States v. Philadelphia National Bank,* 374 U.S. 321, 83 S.Ct. 1715 (1963); *United States v. Household Finance Corp.*, 602 F.2d 1255 (7th Cir. 1979); *Brown Shoe* (*supra*); and *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698 (1966).

The reasoning of the Court of Appeals in affirming the granting of a Motion to Dismiss the antitrust counts in Petitioners-Plaintiffs' Complaint/Petition is:

> "We first address the issue of whether plaintiffs have standing to bring a private action under the federal antitrust laws. *See* 15 U.S.C. §15. Congress enacted '[t]he Sherman Act * * * to protect "the economic freedom of participants in the relevant market." ' *Henke Enterprises, Inc.*, 749 F.2d at 489 (quoting *Associated Gen. Contractors v. California State Council of Carpenters*, 459 U.S. 519, 538 (1983) (footnote omitted)). Here, Fleming's activities occurred in the grocery market. The plaintiffs were not competitors, participants, or consumers in that relevant market. In fact, the plaintiffs' connection to Fleming arose only from the plaintiffs' close physical proximity to Fleming's leased space in Ruskin Center. Although the plaintiffs may have been injured by Fleming's failure to keep an anchor tenant in its leased space, the injury did not arise from anticompetitive activity in an economic market in which plaintiffs participated. *See id.* at 489-90."

The action of the Court of Appeals below is premised on evaluating Petitioners-Plaintiffs' standing based upon assumption of a submarket, a "grocery market", and ignoring the relevant product market set forth in Petitioners-Plaintiffs' Complaint/Petition.

The Complaint/Petition of Petitioners set forth the following definition of the product market involved in this matter:

> "a. Product Market—Local Shopping Center Services—a cluster of retail goods and services offered by separate, individually operated retail establishments in proximate geographic location. Local shopping center retail establishments can be charac-

terized as 'anchor'/'magnet' retailers and 'other'/'ancillary' retailers. The anchor/magnet retailers, by definition of the designation as anchor/magnet, have market power in the local shopping center geographic market. The success of the entire local shopping center is directly dependent upon the continuing successful retail operations of the magnet/anchor retailer. Retail establishments locate in local shopping centers because their combined ability to attract consumers is greater than the sum of their individual abilities in separate geographic locations."

Both the District Court and Court of Appeals in considering a Motion to Dismiss based upon the pleadings chose to ignore that clear allegation of material fact and to focus upon a submarket, groceries, nowhere alleged in either the Complaint or Petition.

> "Since we are reviewing a dismissal on the pleadings, we must, of course, take as true the material facts alleged in Petitioner's Amended Complaint. *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 740, 96 S. Ct. 1848, 1850 (1976)."

The Market in Question

Local Shopping Centers and Regional Shopping Malls

The significance of this case is the market to which the allegations of Petitioners-Plaintiffs' Complaint/Petition was directed. It was not the submarket of groceries. It was consumer traffic for shopping centers, the flow of which was blocked by the affirmative acts of Respondent-

Defendant. Neither the District Court nor the Appellate Court ever focused on the market as alleged in the Complaint/Petition. And, since Petitioners-Plaintiffs have never had their day in Court, the Pleadings as they stood were the only factor upon which a ruling could be based at the time in which it was rendered. As defined in Petitioners-Plaintiffs' Complaint/Petition the market was:

> "a. Product Market—Local Shopping Center Services—*supra*, pages 12-13.
>
> "c. LOCAL SHOPPING CENTER—Offers convenience and immediacy to consumers of a selected range of goods and services in one geographic location which is convenient to residential areas, situated along a major surface street thoroughfare and readily accessible by automobile. Consumers of local shopping center cluster of services will be located with a one (1) to two (2) mile radius of the local shopping center. The various independent retailer in a local shopping center will share a common parking facility and access to the different shops will be via an outside sidewalk.
>
> d. REGIONAL SHOPPING MALL—offers a wide range of goods not frequently needed and fashionable items (especially clothing) to consumers in one geographic location with access between stores within a climate controlled mall. The shopping center will be geographically situated so as to be accessible to/from interstate highway(s) and draw customers mainly within 5 to 10 miles radius but many customers come from outside the metropolitan area."

It is the synergistic effect of the cluster of services offered by the local shopping center and regional shopping

mall that is an attraction of consumers greater than the sum of separate geographic locations. (Webster's New World Dictionary: "Synergistic: The simultaneous action of separate agencies which together have greater total effects than the sum of their individual effects").

Consumers are attracted to and retail establishments locate in local shopping centers and regional shopping malls because "it is this cluster of services which attracts consumers. An anchor or magnet tenant provides the primary magnet or attraction to consumers and its successor and continuing retail operations are necessary to the successful operation of the shopping center. Other independently operated retail establishments are secondary to and ancillary to the anchor or magnet retail establishment(s)."

Specific space in each local shopping center and regional shopping mall is created for the anchor or magnet tenant and is an essential facility as defined in Petitioners-Plaintiffs' Complaint/Petition:

> "e. ANCHOR OR MAGNET TENANT—Normally located at the 'end' of the shopping center and thereby anchor the shopping center. The anchor or magnet tenant provides the primary magnet or attraction to consumers and the successful and continuing retail operations are necessary to the successful operation of the shopping center. Other independently operated retail establishments located in a shopping center are secondary to and ancillary to the anchor or magnet retail establishment(s).
>
> f. 'ESSENTIAL FACILITY'—A service or product access to which ability to participate in a market is dependent."

Respondent-Defendant's Illegal Conduct

This matter concerns the effect of Respondent-Defendant having "elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years."

Here two local shopping centers had competed until Respondent-Defendant by obtaining control of the essential facility prevented the operation of a magnet-anchor tenant in one local shopping center. Defendant-Respondent by its acts affirmatively blocked the use of the Ruskin Heights facility.

The Supreme Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 108 S.Ct. 2847, 2858 (1985) stated:

> "As Judge Bork stated more recently: 'Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended.'
>
> The qualification on the right of a monopolist to deal with whom he pleases is not so narrow that it encompasses no more than the circumstances of *Lorain Journal*. In the actual case that we must decide, the monopolist did not merely reject a novel offer to competitor. Rather, the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years. The all-Aspen, 6-day ticket with revenues allocated on the basis of usage was first developed when three independent companies operated three different ski mountains in the Aspen area. *Supra*, at 2850 and n. 7. It continued to provide a desirable option for skiers when the market was enlarged

to include four mountains, and when the character of the market was changed Ski Co.'s acquisition of monopoly power. Moreover, since the record discloses that interchangeable tickets are used in other multi-mountain areas which apparently are competitive, it seems appropriate to infer that such tickets satisfy consumer demand in free competitive markets."

In the Spring of 1982, Respondent-Defendant assumed the operation of the anchor or magnet tenant in the Ruskin Heights Shopping Center.

Pursuant to Respondent-Defendant's assumption of the operations of the anchor or magnet tenant in the Ruskin Heights Shopping Center, "A&P" assigned to Respondent-Defendant its lease with Ruskin Heights Associates. Thereby Respondent-Defendant acquired monopoly and economic power in the relevant product and geographic market by control of the essential facility in the Ruskin Heights Shopping Center.

Since at least the Spring of 1982 and continuing thereafter Respondent-Defendant and Ruskin Heights Associates have engaged, individually and in concert, in unlawful activities which have unreasonably restrained interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Antitrust Act.

In furtherance of the aforesaid antitrust violations, Respondent-Defendant, among other things, has since on or before March 1, 1982, done the following:

a. Ceased operation as the anchor or magnet tenant in the Ruskin Heights Shopping Center.

b. Placed a sign on the closed anchor or magnet retail facility in the Ruskin Heights Shopping Center directing customers to the Longview Shopping Center; and

c. Refused to deal or negotiate with potential candidates to assume operation of the closed essential, anchor or magnet retail facility in the Ruskin Heights Shopping Center.

The aforesaid acts by Respondent-Defendant have had the following effects, among others:

The interstate commerce of goods and services sold by tenants in the Ruskin Heights Shopping Center has been unreasonably restrained in that:

a. PUBLIC INJURY—By not leasing (renting) the vacated essential facility retail space to a viable anchor or magnet retail establishment, the public or consumer injury is in the form of foreclosed consumer choice and necessary increased driving required for consumers to avail themselves of a full cluster of shopping center services; and

b. PRIVATE INJURY—By not leasing (renting) the vacated retail space to a viable anchor or magnet retail establishment, the Ruskin Heights Shopping Center is prevented from offering a full cluster of retail goods and services to consumers and is thereby deprived of the synergistic benefit of a shopping center location.

> "It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws have been violated. It is sufficient that a restraint of trade or monopoly results in the consequences of a defendant's conduct or business arrangements. *United States v. Patten*, 226 U.S. 525, 543, 33 S.Ct. 141, 145, 57 L.Ed.

> 333, 44 L.R.A., N.S., 325; *United States v. Masonite Corporation,* 316 U.S. 264, 275, 62 S.Ct. 1070, 1076, 86 L.Ed. 1461. To require a greater showing would cripple the Act. As stated in *United States v. Aluminum Co. of America,* 2 Cir., 148 F.2d 416, 432, 'no monopolist monopolizes unconscious of what he is doing.' Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act."

United States v. Griffith, 334 U.S. 100, 105, 68 S.Ct. 941, 944 (1948).

Other courts have discussed the target area test in terms of whether it was reasonably foreseeable that the area of the economy in which the plaintiff operates would have been affected by the antitrust violation.

Solinger v. A&M Records, Inc., 586 F.2d 1304 (9th Cir. 1978), *cert. denied,* 441 U.S. 908 (1979). *See also Parks v. Watson,* 716 F.2d 646 (9th Cir. 1983); *Blankenship v. Hearst Corp.,* 519 F.2d 418 (9th Cir. 1975); *In Re Western Liquid Asphalt Cases,* 487 F.2d 191, 199 (9th Cir. 1973), *cert. denied,* 415 U.S. 919 (1974); *Mulvey v. Samuel Goldwyn Productions,* 433 F.2d 1073 (9th Cir. 1970), *cert. denied,* 402 U.S. 923 (1971); *Hoopes v. Union Oil Co.,* 374 F.2d 480 (9th Cir. 1967).

As stated by this court in *NCAA v. Board of Regents,* 468 U.S. 85, 104 S.Ct. 2948 (1984):

> "Congress designed the Sherman Act as a consumer welfare prescription . . . a restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law."

As that case illustrates market determination is a factual matter requiring in depth factual analysis. This court held that the lower court employed the correct test for market determination—"whether there are other products that are reasonably substitutable for televised NCAA football games. Although advertisers and broadcasters have alternative programming, the court found ample support for the conclusion below that college football attracted "an audience uniquely attractive to advertisers" who "will pay a premium price per viewer" with appealing demographic characteristics. Because there was "no reasonable substitute," college football "constitutes a separate market . . . whether the market is defined from the standpoint of broadcasters, advertisers, or viewers." (468 U.S. 111-112, n. 49).

Standing Under Sections 4 and 16, Clayton Act

Section 4 of Clayton says that "any person injured in his business or property" by an antitrust violation shall be entitled to recover damages; Section 16 says that "any person, firm, corporation or association shall be entitled to sue and have injunctive relief . . . against threatened loss or damage" due to such a violation. (15 U.S.C. Sections 15, 26). *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977); *Blue Shield of Virginia v. McCleary,* 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982); *Associated General Contractors v. California State Council of Carpenters,* 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983).

The importance of not unduly placing burdens on those individuals seeking to bring private actions under Section 4 of the Clayton Act was well stated by this

court in rejecting the "passing-on" defense in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494, 88 S.Ct. 2224, 2232 (1968):

> "In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality. Because no one was available who would bring suit against them, Treble-damage actions, the importance of which the court has many times, emphasized, would be substantially reduced in effectiveness:"

That reasoning is the most applicable in this matter.

> "Treble-damages antitrust were first authorized by §7 of the Sherman Act, 26 Stat. 210 (1890). The discussions of this section on the floor of primarily as a remedy for '[t]he people of the United States as individuals.' especially consumers. 21 Cong. Rec. 1767-1768 (1890) (remarks of Sen. George); *see id.*, at 2612 (Sens. Teller and Reagan), 2615 (Sen. Coke), 3146-3149. Treble-damages were provided in part for punitive purposes, *id.*, at 3147 (Sen. George), but also to make the remedy meaningful by counter-balancing 'the difficulty of maintaining a private suit against a combination such as is described' in the Act. *Id.* at 2456 (Sen. Sherman)."

> "When Congress enacted the Clayton Act in 1914, it 'extend[ed] the remedy under Section 7 of the Sherman Act' to persons injured by virtue of any antitrust violation. H.R. Rep. No. 627, 63d Cong., 2d Sess, 14 (1914). The initial House debates concerning provisions related to private damages actions reveal that these actions were conceived primarily

as 'open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and give[ing] the injured party ample damages for the wrong suffered.' 51 Cong. Rec. 9073 (1914) (remarks of Rep. Webb); *see, e.g., id.*, at 9079 (Rep. Volstead), 9270 (Rep. Carlin), 9414-9417, 9466-9467, 9487-9495. The House debates following the conference committee report, however, indicate that the sponsors of the bill also saw treble-damages suits as an important means of enforcing the law. *Id.*, at 16274-16275 (Rep. Webb), 16317-16319 (Rep. Floyd). In the Senate there was virtually no discussion of the enforcement value of private actions, even though the bill was attacked as lacking meaningful sanctions, *e.g., id.* at 15881, 15882 (Sen. Reed), 16042-16046 (Sen. Norris)."

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., (*supra*), Footnote at page 696.

"In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to their customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness."

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 494, 88 S.Ct. 2224, 2232 (1968).

This court in *Blue Shield of Virginia v. McCleary*, 102 S.Ct. 2540 (1982) squarely held that a plaintiff need not be a direct competitor of the antitrust violation to have standing stating, at p. 2545:

> "As we have recognized 'the statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . the act is comprehensive in its terms and coverage protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.' "

Citing *Manneville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236, 68 S.Ct. 996, 1006, 92 L.Ed. 1328 (1948).

The following tests for standing as stated by this court are:

Associated Gen. Contractors v. California State Council of Carpenters, (supra), n. 7, S.Ct. 909-912, 459 U.S. 547.

> "Factors relevant to whether a plaintiff is a 'person * * * injured in his business or property' by reason of anything forbidden in antitrust laws, so as to be entitled to treble damages, include whether plaintiff is a consumer or competitor in the market which trade was restrained, directness or indirectness of asserted injury, potential for duplicative recovery or complex apportionment of damages and existence of more direct victims of the challenged conduct as well as tenuous and speculative character of causal relationship. Sherman Anti-Trust Act, §2, 26 U.S.C.A. §1; §7, 26 Stat. 209; Clayton Act, §4, 15 U.S.C.A. §15."

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., (*supra*), at 429 U.S. 477, 97 S.Ct. 690 (1977).

> "Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful."

Blue Shield of Virginia v. McCleary, (*supra*), at 2546-8 S.Ct., 476-480 U.S.

> "In determining whether particular injury is too remote from alleged antitrust violation to warrant standing under Clayton Act, consideration to be given to the physical and economic nexus to an alleged violation and harm to plaintiff, and more particularly, to relationship of injury alleged with those forms of injury which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under Clayton Act. Clayton Act, §4, 15 U.S.C.A. §15."

Petitioners-Plaintiffs meet all tests.

Motion for Summary Judgment

The District Court sustained the Respondent-Defendant's Motion for Summary Judgment of Petitioners-Plaintiffs' Tort Counts solely on a failure to negate justification for Respondent-Defendant's conduct. Under the law of Missouri anticompetitive conduct negates justification. *Briner Electric Co. v. Sachs Electric Co.*, 680 S.W.2d 737, 741 (Mo. App. 1984).

In *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962) this Court cautioned against the improper

use of summary judgment in complex antitrust cases, stating:

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot . . . Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.' "

CONCLUSION

Since pretrial discovery has been completed and both parties have filed lists of exhibits and witnesses and are in the process of shortly completing the trial brief, it is respectfully requested that this matter be returned to the District Court for trial.

Respectfully submitted,

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APPENDIX

(Filed June 16, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-1775

Alpha Shoe Service, Leroy E. Kendricks d/b/a Alpha Shoe Service; The Drug Store, Inc. d/b/a The Drug Store; Singer Jewelry, Inc. d/b/a Singer Jewelry; Ruskin Heights Barber Shop, Samuel R. Scarcello d/b/a Ruskin Heights Barber Shop; Ruskin Hardware, Inc. d/b/a Ruskin Sentry Hardware,
Appellants,

v.

Fleming Companies, Inc.,
Appellee,

Melva Carter d/b/a Ruskin Center Salon,
Appellant,

v.

Fleming Companies, Inc.,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: March 17, 1988
Filed: June 16, 1988

Before FAGG, Circuit Judge, WRIGHT,* Senior Circuit Judge, and MAGILL, Circuit Judge.

PER CURIAM.

Plaintiffs, tenants of Ruskin Heights Shopping Center (Ruskin Center) located in Kansas City, Missouri, appeal from two adverse decisions of the district court. The court first dismissed the plaintiffs' federal and state antitrust claims against the defendant, Fleming Companies, Inc. (Fleming), an Oklahoma corporation and wholesale grocery supplier. The court later granted summary judgment in favor of Fleming on the plaintiffs' state tort claims. We affirm the district court in all respects.

Until 1982 the Great Atlantic and Pacific Tea Company (A & P) operated a grocery store in the anchor location of Ruskin Center. During the same period, Fleming supplied products to a competing grocery store that was the anchor tenant at Longview Shopping Center (Longview Center). Longview Center was located only four blocks from Ruskin Center. Through the purchase of several A & P grocery stores, Fleming became the assignee of the lease for the anchor tenant space in Ruskin Center. After the lease assignment, Fleming closed the A & P store in Ruskin Center and left the space empty. Fleming also placed a sign on the door of the former A & P store that directed consumers to the grocery store at Longview Center.

When Fleming did not fill the leased space with another anchor tenant, the plaintiffs sued. They asserted

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*The HONORABLE EUGENE A. WRIGHT, Senior United States Circuit Judge for the Ninth Circuit, sitting by designation.

federal and state antitrust violations, *see* Sherman Act, 15 U.S.C. §§ 1, 2; Mo. Ann. Stat. § 416.031 (Vernon 1979), and, in addition, several state tort claims. Specifically, the plaintiffs maintained they were injured by Fleming because it kept the anchor tenant location empty for an extended period of time. According to the plaintiffs, the absence of an anchor tenant in Ruskin Center resulted in diminished consumer traffic at the shopping center and thus less business for them.

Fleming responded by filing a motion to dismiss the antitrust claims, and the district court granted the motion. The court concluded that under *Henke Enterprises, Inc. v. Hy-Vee Food Stores, Inc.*, 749 F.2d 488 (8th Cir. 1984), the plaintiffs lacked standing to sue based on the federal antitrust laws. Similarly, the plaintiffs lacked standing to sue on their state antitrust claims because Missouri intended that its antitrust laws be construed in harmony with federal antitrust statutes. *See* Mo. Ann. Stat. § 416.141 (Vernon 1979).

Fleming also filed a motion for summary judgment on the plaintiffs' tort claims. The court granted this motion after determining that the plaintiffs had failed to make a sufficient showing on essential elements in their causes of action. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Plaintiffs now appeal from both district court determinations.

We first address the issue whether plaintiffs have standing to bring a private action under the federal antitrust laws. *See* 15 U.S.C. § 15. Congress enacted "[t]he Sherman Act * * * to protect 'the economic freedom of participants in the relevant market.'" *Henke Enters., Inc.*, 749 F.2d at 489 (quoting *Associated Gen. Contrac-*

tors v. California State Council of Carpenters, 459 U.S. 519, 538 (1983) (footnote omitted)). Here, Fleming's activities occurred in the grocery market. The plaintiffs were not competitors, participants, or consumers in that relevant market. In fact, the plaintiffs' connection to Fleming arose only from the plaintiffs' close physical proximity to Fleming's leased space in Ruskin Center. Although the plaintiffs may have been injured by Fleming's failure to keep an anchor tenant in its leased space, the injury did not arise from anticompetitive activity in an economic market in which plaintiffs participated. *See id.* at 489-90.

The plaintiffs try to distinguish *Henke Enterprises, Inc.* by arguing the relevant market here was the "attraction of consumers." The plaintiffs, however, refer to no persuasive authority to support this broad definition of the relevant market. In addition, if this court were to accept the plaintiffs' market definition, we would expand the scope of the private antitrust action far beyond its intended bounds. A private antitrust action is not available to remedy every injury suffered by a player in the general economy. *See Associated Gen. Contractors*, 459 U.S. at 535-36. Rather, to maintain a private antitrust action, a party's claimed injury must be sufficiently linked to the procompetitive policies underlying the antitrust laws. *See Henke Enters., Inc.*, 749 F.2d at 490; *see also id.* at 489.

As in *Henke Enterprises, Inc.*, the plaintiffs have not suffered an antitrust-type injury and thus do not have standing to sue under the federal antitrust laws. *Id.* at 489-90; *see Midwest Communications, Inc. v. Minnesota Twins, Inc.*, 779 F.2d 444, 450 n.6 (8th Cir. 1985),

cert. denied, 476 U.S. 1163 (1986); *see also General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 809 (8th Cir. 1987). Further, we agree with the district court that the plaintiffs also lack standing to sue on their state antitrust claims. *See* Mo. Ann. Stat. § 416.141.

We now turn to the summary judgment issue. After reviewing the record and the applicable legal principles, we conclude the district court properly granted summary judgment in favor of the defendant on the plaintiffs' state tort claims. *See Celotex Corp.*, 477 U.S. at 322-23.

The district court's decisions are well reasoned. We affirm. *See* 8th Cir. R. 14.

A true copy.

(Filed February 6, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

Case No. 86-0161-CV-W-6

Ruskin Center Salon, Melva Carter, D/B/A Ruskin Center Salon, 8024 Sunset Circle, Grandview, Missouri 64030,

Alpha Shoe Service, Leroy E. Kendricks, D/B/A Alpha Shoe Service, 11112 Blue Ridge, Kansas City, Missouri 64134,

Supreme Cleaners, Sam and Helen McKee, D/B/A Supreme Cleaners, 11114 Blue Ridge, Kansas City, Missouri 64134,

The Drug Store, Inc., D/B/A The Drug Store, Eugene Feldhausen, 10920 Ambassador Drive, Kansas City, Missouri 64153,

Singer Jewelry, Inc., D/B/A Singer Jewelry, Steven J. Block, 9233 Ward Parkway, Kansas City, Missouri 64114,

Carla's Corner, Larry Wiseman, D/B/A Carla's Corner, 650 East Blue Ridge Ext., Kansas City, Missouri 64145,

Ruskin Heights Barber Shop, Samuel R. Scarcello, D/B/A Ruskin Heights Barber Shop, 11128 Blue Ridge Extension, Kansas City, Missouri 64134,

Klahn Real Estate Company, D/B/A Century 21 Klahn Real Estate, Don Klahn, 11146 Blue Ridge, Kansas City, Missouri 64134,

Ruskin Hardware, Inc., D/B/A Ruskin Sentry Hardware, Louis Angotti, 11152 Blue Ridge, Kansas City, Missouri 64134,

Henri-Kemp Investments, D/B/A McHenry's Appliance Store, Earl Maddox, 1221 Baltimore, Kansas City, Missouri 64106, McHenry's Appliance Store,
Plaintiffs,

vs.

FLEMING COMPANIES, INC., a Corporation (Serve: CT Corporation Systems, Registered Agent, 314 North Broadway, St. Louis, Missouri 63102),
Defendant.

COMPLAINT CHARGING VIOLATION OF ANTITRUST LAW

Plaintiffs, (as listed and identified in the caption of this complaint which are incorporated herein by reference as though fully set forth herein) bring this action against defendant and for their claims state as follows:

JURISDICTION

1. Plaintiffs bring this action against defendant Fleming Companies, Inc. under the Sherman Antitrust Act of July 2, 1890, 15 U.S.C. Section 1, *et seq.*, and under the Clayton Antitrust Act of October 15, 1914, 15 U.S.C. Section 12, *et seq.*, for injunctive relief and to recover damages and the costs of this suit, including reasonable attorneys fees against the defendant for injuries sustained and being

sustained by plaintiffs by reason of defendant's violations of Section 1 and Section 2 of the Sherman Antitrust Act, 15 U.S.C. Sections 1 and 2.

JURISDICTION

2. The jurisdiction of this Court is based upon 28 U.S.C. Section 1337, which grants original jurisdiction to the District Courts over any civil action or proceeding arising under any act of Congress regulating or protecting trade and commerce against restraints and monopolies.

VENUE

3. Venue is in this Court pursuant to the provisions of Section 12 of The Clayton Act, 15 U.S.C. Section 22, as defendant maintains an office, transacts business, and is found within the Western District of Missouri, Western Division, and has a corporate office and place of business at 1100 Atlantic Avenue, North Kansas City, Clay County, Missouri.

PLAINTIFFS

4. Plaintiffs are each individuals, partnerships, and corporations whose respective residences are set forth in the caption hereof. This action is brought by plaintiffs who currently are or were independent business persons, partnerships and corporations engaged in the business of retail sales and services at the Ruskin Heights Shopping Center.

5. All plaintiffs have been wronged and damaged by the acts and practices alleged herein, and there are questions of law and fact common to all plaintiffs which predominate over any questions affecting only individual plaintiffs.

DEFENDANT

6. Defendant, Fleming Companies, Inc. is an Oklahoma corporation with a place of business in North Kansas City at 1100 Atlantic, Clay, Jackson County, Missouri. Defendant is qualified to conduct business and does conduct business in the Western District of Missouri, Western Division.

DEFINITIONS

As used herein the terms set forth below have the following meanings:

a. PRODUCT MARKET—Local Shopping Center Services—a cluster of retail goods and services offered by separate, individually operated retail establishments in proximate geographic location. Local shopping center retail establishments can be characterized as "anchor"/"magnet" retailers and "other"/"ancillary" retailers. The anchor/magnet retailers, by definition of the designation as anchor/magnet, have market power in the local shopping center geographic market. The success of the entire local shopping center is directly dependent upon the continuing successful retail operations of the magnet/anchor retailer. Retail establishments locate in local shopping centers because their combined ability to attract consumers is greater than the sum of their individual abilities in separate geographic locations.

b. GEOGRAPHIC MARKET—

i. Ruskin Heights Shopping Center—street boundaries are as follows:

(a) North—Interstate I-470

(b) East—Raytown Road

(c) South—71 Highway

(d) West—Grandview Road

ii. Longview Shopping Center—street boundaries are as follows:

(a) North—Interstate I-470

(b) East—Raytown Road

(c) South—71 Highway

(d) West—Grandview Road

iii. NOTE the street boundaries of the two shopping centers in question are identical. This is because the two shopping centers are geographically closely situated and the street boundaries either form or designate natural geographic boundaries.

iv. North—Interstate I-470 is a geographic barrier because of its construction through land which was not previously developed. Also, the interstate itself is a natural barrier because of the limited number of crossing points (elevated bridges).

v. East—Raytown Road designates a natural geographic barrier (boundary) because East of Raytown Road is farming land (e.g., Longview Farm, Longview College) and a large lake.

vi. South—71 Highway is a geographic barrier because it is a divided 4-lane highway with a limited number of crossing points (elevated bridges).

vii. West—Grandview Road designates a natural geographic barrier (boundary) because of its being a major thoroughfare plus, there are two local shopping centers located West of Grandview Road which better serves this separate geographic market.

c. LOCAL SHOPPING CENTER—Offers convenience and immediacy to consumers of a selected range of goods services in one geographic location which is convenient to residential areas, situated along a major surface street thoroughfare and readily accessible by automobile. Consumder of local shopping center cluster of services will be located with a one (1) to two (2) mile radius of the local shopping center. The various independent retailers in a local shopping center will share a common parking facility and access to the different shops will be via an outside sidewalk.

d. REGIONAL SHOPPING MALL—Offers a wide range of goods not frequently needed and fashionable items (especially clothing) to consumers in one geographic location with access between stores within a climate controlled mall. The shopping center will be geographically situated so as to be accessible to/from interstate highway(s) and draw customers mainly within 5 to 10 miles radius but many customers come from outside the metropolitan area.

e. ANCHOR OR MAGNET TENANT—Normally located at the "ends" of the shopping center and thereby anchor the shopping center. The anchor or magnet tenant provides the primary magnet or attraction to consumers and the successful and continuing retail operations are

necessary to the successful operation of the shopping center. Other independently operated retail establishments located in a shopping center are secondary to and ancillary to the anchor or magnet retail establishment(s).

f. ESSENTIAL FACILITY—A service or product access to which ability to participate in a market is dependent.

TRADE AND COMMERCE

Ruskin Heights Shopping Center is a local shopping center located on Blue Ridge Boulevard between 117th Streets within the relevant geographic market. It is comprised of an "anchor" or "magnet" tenant and secondary and ancillary retail businesses, including businesses of plaintiffs. Access to space to conduct an operating "Anchor" or "Magnet" tenant is an "Essential Facility".

Longview Shopping Center is a local shopping center located on the southeast corner of Blue Ridge Boulevard and Longview Road within the relevant geographic market. It is comprised of an "anchor" or "magnet" tenant and secondary and ancillary retail businesses.

These two local shopping centers are within four city blocks of each other and compete for retail purchasers of local shopping center cluster goods and services. A substantial quantity of said goods move in interstate commerce from outside the State of Missouri into the State of Missouri and are substantially affected by the competition between the two said local shopping centers.

Defendant at all times concerned herein, sold products at wholesale to the anchor or magnet tenant of the Longview Shopping Center for resale to consumers in the Longview Shopping Center.

Ruskin Heights Associates, a general partnership, since on or about January 8, 1982, has been the owner of the Ruskin Heights Shopping Center.

Since on or around May 11, 1979, the Great Atlantic and Pacific Tea Company ("A&P") has leased premises within the Ruskin Heights Shopping Center for the purpose of operating an anchor or magnet business and did so operate until on or about March 1, 1982. The lease provided from a term of ten years ending November 30, 1989.

Pursuant to Ruskin Heights Associates purchase of the Ruskin Heights Shopping Center, the lease dated May 11, 1979, with A & P was assigned to Ruskin Heights Associates.

In the Spring of 1982, defendant assumed the operation of the anchor or magnet tenant in the Ruskin Heights Shopping Center.

Pursuant to defendant's assumption of the operations of the anchor or magnet tenant in the Ruskin Heights Shopping Center, "A & P" assigned to defendant its lease with Ruskin Heights Associates. Thereby defendant acquired monopoly and economic power in the relevant product and geographic market by control of the essential facility in the Ruskin Heights Shopping Center.

Beginning since prior to at least the Spring of 1982 and continuing thereafter at least up to and including the filing of this Complaint, the exact dates being unknown to the plaintiffs, defendant, Ruskin Heights Associates and others presently unknown to the plaintiffs have engaged, individually and in concert, in unlawful activities which have unreasonably restrained the aforemen-

tioned interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Antitrust Act.

In furtherance of the aforesaid antitrust violations, defendant, among other things, has since on or about March 1, 1982, done the following:

a. Ceased operation as the anchor or magnet tenant in the Ruskin Heights Shopping Center.

b. Placed a sign on the closed anchor or magnet retail facility in the Ruskin Heights Shopping Center directing customers to The Longview Shopping Center; and

c. Refused to deal or negotiate with potential candidates to assume operation of the closed essential, anchor or magnet retail facility in the Ruskin Heights Shopping Center.

THE ANTI-COMPETITIVE EFFECTS OF DEFENDANTS ACTS

The aforesaid acts by defendant have had the following effects, among others:

The interstate commerce of goods and services sold by tenants in the Ruskin Heights Shopping Center has been unreasonably restrained in that:

a. PUBLIC INJURY—By not leasing (renting) the vacated essential facility retail space to a viable anchor or magnet retail establishment, the public or consumer injury is in the form of foreclosed consumer choice and necessary increased driving required for consumers to avail themselves of a full cluster of shopping center services; and

b. PRIVATE INJURY—By not leasing (renting) the vacated retail space to a viable anchor or magnet retail establishment, the Ruskin Heights Shopping Center is prevented from offering a full cluster of retail goods and services to consumers and is thereby deprived of the synergistic benefit of a shopping center location.

As a result of its acts in that part of trade and commerce and defendant has, thereby, unreasonably restrained the aforesaid trade and commerce, and defendant, by its act, has threatened to continue to unreasonably restrain the aforesaid trade and commerce, and unless prohibited, defendant is likely to continue substantially lessening competition in violation of sections 1 and 2 of the Sherman Antitrust Act.

OFFENSE CHARGED

Since on or about March 1, 1982, defendant has used its monopoly and economic power in the relevant product market in the relevant geographic market by contract, combination and conspiracy, with Ruskin Heights Associate and other persons to thereby, unreasonably restrain that part of trade and commerce occurring among and substantially affecting the several states of the United States as aforesaid and in doing so, defendant did, in fact unreasonably restrain said trade and commerce in violation of Sections 1 and 2 of the Sherman Antitrust Act.

On or about March 1, 1982, defendant, Ruskin Heights Associates, and others by contract, combination and conspiracy unreasonably restrained interstate trade and commerce in the relevant product market in the relevant geographic market in violation of Section 1 of the Sherman Antitrust Act and thereby to damage plaintiffs' business and property.

Defendant claims the right to continue to engage in all of the aforesaid unlawful practices and if defendant is not prohibited, it will continue to engage in the aforesaid unlawful conduct.

WHEREFORE, plaintiffs pray judgment and its complaing:

a. For a permanent injunction.

b. For three-fold the damages sustained by plaintiffs' business and property by reason of defendant's unlawful acts; and

c. For costs including reasonable attorney's fees.

COUNT II

Plaintiffs hereby incorporate by reference all of the allegations of Count I.

OFFENSE CHARGED

Beginning on or about March 1, 1982, defendant with others used its monopoly and economic power to gain a competitive advantage for the Longview Shopping Center over the Ruskin Heights Shopping Center in the relevant product market in the relevant geographic market thereby unreasonably restraining interstate trade and commerce in violation of Section 2 of The Sherman Act and therefore to damage plaintiffs' business and property.

JURY DEMAND

Please take notice that plaintiffs demand a trial by jury, pursuant to Rule 38(b), Federal Rules of Civil Procedure, of all issues herein.

/s/ Eugene J. Feldhausen
Attorneys for Plaintiffs

(Filed February 6, 1987)

IN THE
CIRCUIT COURT OF CLAY COUNTY, MISSOURI

CASE No. 86-0371-CV-W-6

Ruskin Center Salon, Melva Carter, D/B/A Ruskin Center Salon, 8024 Sunset Circle, Grandview, Missouri 64030,

Alpha Shoe Service, Leroy E. Kendricks, D/B/A Alpha Shoe Service, 11112 Blue Ridge, Kansas City, Missouri 64134,

Supreme Cleaners, Sam and Helen McKee, D/B/A Supreme Cleaners, 11114 Blue Ridge, Kansas City, Missouri 64134,

The Drug Store, Inc., D/B/A The Drug Store, Eugene Feldhausen, 10920 Ambassador Drive, Kansas City, Missouri 64153,

Singer Jewelry, Inc., D/B/A Singer Jewelry, Steven J. Block, 9233 Ward Parkway, Kansas City, Missouri 64114,

Carla's Corner, Larry Wiseman, D/B/A Carla's Corner, 650 East Blue Ridge Ext., Kansas City, Missouri 64145,

Ruskin Heights Barber Shop, Samuel R. Scarcello, D/B/A Ruskin Heights Barber Shop, 11128 Blue Ridge Extension, Kansas City, Missouri 64134,

Klahn Real Estate, D/B/A Century 21 Klahn Real Estate, Don Klahn, 11146 Blue Ridge, Kansas City, Missouri 64134,

Ruskin Hardware, Inc., D/B/A Ruskin Sentry Hardware, Louis Angotti, 11152 Blue Ridge, Kansas City, Missouri 64134,

Henri-Kemp Investments, D/B/A McHenry's Appliance Store, Earl Maddox, 1221 Baltimore, Kansas City, Missouri 64106,
Plaintiffs,

vs.

FLEMING COMPANIES, INC., a CORPORATION (Serve: CT Corporation Systems, Registered Agent, 314 North Broadway, St. Louis, Missouri 63102),
Defendant.

PETITION FOR DAMAGES AND INJUNCTION

CHARGING VIOLATION OF MISSOURI ANTITRUST LAW

Plaintiffs, (as listed and identified in the caption of this petition which are incorporated herein by reference as though fully set forth herein) bring this action against defendant and for their claims state as follows:

COUNT I

JURISDICTION

1. Plaintiffs bring this action against defendant Fleming Companies, Inc. under the MISSOURI ANTITRUST LAW; SECTIONS 416.011-416.161 as provided in Section 416.121, for injunction relief and to recover damages and the costs of this suit, including reasonable attorneys fees against the defendant for injuries sustained and being sustained by plaintiffs by reason of defendant's violations of Section 416.31, 1 and 2 of THE MISSOURI ANTITRUST LAW.

2. The jurisdiction of this Court is based upon Sections 416.071 and 416.131 of THE MISSOURI ANTITRUST LAW.

VENUE

3. Venue is in this Court pursuant to the provisions of Section 416.131 of THE MISSOURI ANTITRUST LAW, as defendant maintains an office, transacts business, and is found and has a corporate office and place of business at 1100 Atlantic Avenue, North Kansas City, Clay County, Missouri within the Circuit for the Circuit Court of Clay County, Missouri.

PLAINTIFFS

4. Plaintiffs are each individuals, partnerships, and corporations whose respective residences are set forth in the caption hereof. This action is brought by plaintiffs who currently are or were independent business persons, partnerships and corporations engaged in the business of retail sales and services at the Ruskin Heights Shopping Center.

5. All plaintiffs have been wronged and damaged by the acts and practices alleged herein, and there are questions of law and fact common to all plaintiffs which predominate over any questions affecting only individual plaintiffs.

DEFENDANT

6. Defendant, Fleming Companies, Inc. is an Oklahoma Corporation with a place of business in North Kansas City at 1100 Atlantic, Clay, Jackson County, Missouri. Defendant is qualified to conduct business and does conduct business in the Circuit for the Circuit Court of Clay County, Missouri.

DEFINITIONS

7. As used herein the terms set forth below have the following meanings:

a. PRODUCT MARKET—Local Shopping Center Services—a cluster of retail goods and services offered by separate, individually operated retail establishments in proximate geographic location. Local shopping center retail establishments can be characterized as "anchor"/"magnet" retailers and "other"/"ancillary" retailers. The anchor/magnet retailers, by definition of the designation as anchor/magnet, have market power in the local shopping center geographic market. The success of the entire local shopping center is directly dependent upon the continuing successful retail operations of the magnet/anchor retailer. Retail establishments locate in local shopping centers because their combined ability to attract consumers is greater than the sum of their individual abilities in separate geographic locations.

b. GEOGRAPHIC MARKET—

I. Ruskin Heights Shopping Center—street boundaries are as follows:

(a) North—Interstate I-470

(b) East—Raytown Road

(c) South—71 Highway

(d) West—Grandview Road

II. Longview Shopping Center—street boundaries are as follows:

(a) North—Interstate I-470

(b) East—Raytown Road

(c) South—71 Highway

(d) West—Grandview Road

III. NOTE the street boundaries of the two shopping centers in question are identical. This is because of the two shopping centers are geographically closely situated and the street boundaries either form or designate natural geographic boundaries. .

IV. North—Interstate I-470 is a geographic barrier because of its construction through land which was not previously developed. Also, the interstate itself is a natural barrier because of the limited number of crossing points (elevated bridges).

V. East—Raytown Road designates a natural geographic barrier (boundary) because East of Raytown Road is farming land (e.g., LONGVIEW FARM, Longview College) and a large lake.

VI. South—71 Highway is a geographic barrier because it is a divided 4-lane highway with a limited number of crossing points (elevated bridges).

VII. West—Grandview Road designates a natural geographic barrier (boundary) because of its being a major thoroughfare plus, there are two local shopping centers located west of Grandview Road which better serves this separate geographic market.

c. LOCAL SHOPPING CENTER—Offers convenience and immediacy to consumers of a selected range of goods and services in one geographic location which is convenient to residential areas, situated along a major surface street throughfare and readily accessible by automobile. Consumder of local shopping center cluster of services will be located with a one (1) to two (2) mile radius of the local shopping center. The various independent retailers in a local shopping center will share a common parking facility an access to the different shops will be via an outside sidewalk.

d. REGIONAL SHOPPING MALL—Offers a wide range of goods not frequently needed and fashionable items (especially clothing) to consumers in one geographic location with access between stores within a climate controlled mall. The shopping center will be geographically situated so as to be accessible to/from interstate highway(s) and draw customers mainly within 5 to 10 miles radius but many customers come from outside the metropolitan area.

e. ANCHOR OR MAGNET TENANT—Normally located at the "ends" of the shopping center and thereby anchor the shopping center. The anchor or magnet tenant provides the primary magnet or attraction to consumers and the successful and continuing retail operations are necessary to the successful operation of the shopping center. Other independently operated retail establishments located in a shopping center are secondary to an ancillary to the anchor or magnet retail establishment(s).

f. "ESSENTIAL FACILITY"—A service or product access to which ability to participate in a market is dependent.

TRADE AND COMMERCE

8. Ruskin Heights Shopping Center is a local shopping center located on Blue Ridge Boulevard between 11th and 12th Streets within the relevant geographic market. It is comprised of an "anchor" or "magnet" tenant and secondary and ancillary retail businesses, including businesses of plaintiffs. Access to space to conduct an operating "Anchor" or "magnet" tenant is an "essential facility."

9. Longview Shopping Center is a local shopping center located on the southeast corner of Blue Ridge Boulevard and Longview Road within the relevant geographical market. It is comprised of an "anchor" or "magnet" tenant and secondary and ancillary retail businesses.

10. These two local shopping centers are within four city blocks of each other and compete for retail purchasers of local shopping center cluster goods and services. A substantial quantity of said goods move in commerce in

the State of Missouri and are substantially affected by the competition between the two said local shopping centers.

11. Defendant at all times concerned herein, sold products at wholesale to the anchor or magnet tenant of the Longview Shopping Center for resale to consumers in the Longview Shopping Center.

12. Ruskin Heights Associates, a general partnership, since on or about January 8, 1982, has been the owner of Ruskin Heights Shopping Center.

13. Since on or around May 11, 1979, the Great Atlantic and Pacific Tea Company ("A&P") has leased premises within the Ruskin Heights Shopping Center for the purpose of operating an anchor or magnet business and did so operate until on or about March 1, 1982. The lease provided for a term of ten years ending November 30, 1989.

14. Pursuant to Ruskin Heights Associates purchase of the Ruskin Heights Shopping Center, the lease dated May 11, 1979, with A & P was assigned to Ruskin Heights Associates.

15. In the Spring of 1982, defendant assumed the operation of the anchor or magnet tenant in the Ruskin Heights Shopping Center.

16. Pursuant to defendant's assumption of the operations of the anchor or magnet tenant in the Ruskin Heights Shopping Center, "A&P" assigned to defendant its lease with Ruskin Heights Associates. Thereby defendant acquired monopoly and economic power in the relevant product and geographic market by control of the essential facility in the Ruskin Heights Shopping Center.

17. Beginning since prior to at least the Spring of 1982 and continuing thereafter at least up to and including

the filing of this Complaint, the exact dates being unknown to the plaintiffs, defendant, Ruskin Heights Associates and others presently unknown to the plaintiffs have engaged, individually and in concert, in unlawful activities which have unreasonably restrained the aforementioned trade and commerce in violation of Section 416.031, 1 and 2 of the Missouri Antitrust Law.

18. In furtherance of the aforesaid antitrust violations, defendant, among other things, has since on or about March 1, 1982, done the following:

a. Ceased operation as the anchor or magnet tenant in the Ruskin Heights Shopping Center.

b. Placed a sign on the closed anchor or magnet retail facility in the Ruskin Heights Shopping Center directing customers to the Longview Shopping Center; and

c. Refused to deal or negotiate with potential candidates to assume operation of the closed essential anchor or magnet retail facility in the Ruskin Heights Shopping Center.

THE ANTI-COMPETITIVE EFFECTS OF DEFENDANTS ACTS

19. The aforesaid acts by defendant have had the following effects, among others:

The commerce of goods and services sold by tenants in the Ruskin Heights Shopping Center has been unreasonably restrained in that:

a. PUBLIC INJURY—by not leasing (renting) the vacated essential facility retail space to a viable anchor or magnet retail establishment, the public or consumer injury is in the form of foreclosed consumer choice and

necessary increased driving required for consumers to avail themselves of a full cluster of shopping center services; and

b. PRIVATE INJURY—by not leasing (renting) the vacated retail space to a viable anchor or magnet retail establishment, the Ruskin Heights Shopping Center is prevented from offering a full cluster of retail goods and services to consumers and is thereby deprived of the synergistic benefit of a shopping center location.

20. As a result of its acts in that part of trade and commerce and defendant has, thereby, unreasonably restrained the aforesaid trade and commerce, and defendant, by its act, has threatened to continue to unreasonably restrain the aforesaid trade and commerce, and unless prohibited, defendant is likely to continue substantially lessening competition in violation of Section 416.031, 1 and 2 of the Missouri Antitrust Law.

OFFENSE CHARGED

21. Since on or about March 1, 1982, defendant has used its monopoly and economic power in the relevant product market in the relevant geographic market by contract, combination and conspiracy, with Ruskin Heights Associates and other persons to thereby, unreasonably restrain that part of trade and commerce occurring in and substantially affecting Trade and Commerce in the State of Missouri as aforesaid and in doing so, defendant did, in fact unreasonably restrain said trade and commerce in violation of Section 416.031, 1 and 2 of The Missouri Antitrust Law.

22. On or about March 1, 1982, defendant, Ruskin Heights Associates, and others by contract, combination

and conspiracy unreasonably restrained trade and commerce in the relevant product market in the relevant geographic market in violation of Section 416.031, 1 of the Missouri Antitrust Law and thereby to damage plaintiffs' business and property.

23. Defendant claims the right to continue to engage in all of the aforesaid unlawful practices and if defendant is not prohibited, it will continue to engage in the aforesaid unlawful conduct.

WHEREFORE, plaintiffs pray judgment: on their petition

a. For a permanent injunction.

b. For three-fold the damages sustained by plaintiffs' business and property by reason of defendants' unlawful acts; and

c. For costs including reasonable attorney's fees.

COUNT II

24. Plaintiffs hereby incorporate by reference all of the allegations of Count I.

OFFENSE CHARGED

25. Beginning on or about March 1, 1982, defendant with others used its monopoly and economic power to gain a competitive advantage for the Longview Shopping Center over the Ruskin Heights Shopping Center in the relevant product market in the relevant geographic market thereby unreasonably restraining trade and commerce in the State of Missouri in violation of Section 416.031, 2 of The Missouri Antitrust Law and therefore to damage plaintiffs' business and property.

WHEREFORE, plaintiffs pray judgment: on their petition:

a. For a permanent injunction.

b. For three-fold the damages sustained by plaintiffs' business and property by reason of defendant's unlawful acts; and

c. For costs including reasonable attorney's fees.

COUNT III

26. Plaintiffs hereby incorporate by reference all of the allegations of Counts I and II.

27. Defendant had knowledge of the contractual arrangements and valid business relationship and expectancy between each of said plaintiffs and the partners of Ruskin Heights Associates, in particular that said contractual arrangements and valid business relationship and expectancy provided that said partners would lease an appropriate part of said local shopping center to a continuously operating anchor or magnet tenant.

28. Defendant intentionally caused a breach of said contractual and valid business relationship and expectancy arrangement by preventing an operating anchor or magnet tenant to occupy any of said local shopping center, said wrongful acts by defendant were without legal justification or excuse and done by wrongful means with malice to injure plaintiffs, therefore plaintiffs seek actual damages in the amount of $10,000,000 and punitive damages in the amount of $10,000,000. For their costs including reasonable attorney's fees and for such future relief as the Court deems just.

COUNT IV

29. Plaintiffs hereby incorporate by reference all of the allegations of Counts I, II and III.

30. The acts of defendant were intentional lawful acts done with intent to cause injury to plaintiffs and in the absence of any or an insufficient justification or excuse for defendant's said acts and thereby caused injury to plaintiffs.

Therefore plaintiffs seek actual damages in the amount of $10,000,000 and punitive damages in the amount of $10,000,000. For their costs including reasonable attorney's fees and for such future relief as the Court deems just.

JURY DEMAND

Please take notice that plaintiffs demand a trial by jury of all issues herein pursuant to Rule 69.01 (a) Missouri Rules of Civil Procedure.

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Attorneys for Plaintiffs

(Filed April 5, 1986)

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 86-0161-CV-W-6

RUSKIN CENTER SALON, Melva Carter, d/b/a RUSKIN CENTER SALON, et al.,
Plaintiffs,

v.

FLEMING COMPANIES, INC., a corporation,
Defendant.

No. 86-0371-CV-W-6

MELVA CARTER d/b/a RUSKIN CENTER SALON, et al.,
Plaintiffs,

v.

FLEMING COMPANIES, INC.,
Defendant.

ORDER CONSOLIDATING CASES

Case No. 86-0371-CV-W-5 was transferred to this division by order dated April 1, 1986, because a related case (No. 86-0161-CV-W-6) was already on my docket. With the consent of plaintiffs, defendant Fleming Companies, Inc. has moved to consolidate the two actions. Both

cases apparently concern identical facts but present different theories of liability. Case No. 86-0161-CV-W-6 was filed initially in federal district court and alleges violations of the federal antitrust laws, in particular the Sherman Act, 15 U.S.C. §§ 1-2. Case No. 86-0371-CV-W-6 was removed from state court on March 21, 1986; it alleges violations of state law. Since plaintiffs could have combined these claims in one lawsuit and since both cases are now pending in this division, consolidation is appropriate. Common questions of law and fact are presented. Accordingly, it is hereby

ORDERED that the above-captioned cases are consolidated.[1]

/s/ Howard F. Sachs
Howard F. Sachs
United States District Judge

DATED: 4-5, 1986.

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1. To avoid confusion and the needless filing of duplicative papers, plaintiffs should consider filing a single amended complaint that combines both state and federal law claims. Defendant could then file a consolidated answer. If that procedure is followed, one of the two cases could be dismissed as redundant.

(Filed May 7, 1986)

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 86-0161-CV-W-6
No. 86-0371-CV-W-6
(Consolidated)

RUSKIN CENTER SALON, et al.,
Plaintiffs,

v.

FLEMING COMPANIES, INC.,
a corporation,
Defendant.

MEMORANDUM AND ORDER

A motion to dismiss pending in the above-captioned antitrust actions is governed by the Eighth Circuit decision in *Henke Enterprises, Inc. v. Hy-Vee Food Stores*, 749 F.2d 488 (1984). The holding in that case that plaintiff-tenant in a retail shopping center did not have standing under the Sherman Act to bring a private action against defendant grocery store is directly on point with the present suit. Plaintiffs here are various tenants at the Ruskin Heights Shopping Center in Kansas City, Missouri, who are complaining of defendant Fleming Companies, Inc.'s actions after it was assigned the lease for the anchor

tenant's premises in 1982. According to plaintiffs' pleadings,[1] the Ruskin Heights Shopping Center is only four city blocks from the Longview Shopping Center and the two establishments are direct competitors. In 1979, pursuant to a ten-year lease, the Great Atlantic and Pacific Tea Company (A&P) began operating a grocery store in the anchor or magnet location at the Ruskin Heights Center. Defendant Fleming, on the other hand, is alleged to be in the business of selling products at wholesale to the anchor or magnet tenant at the Longview Shopping Center - another grocery store. In the spring of 1982, apparently in connection with defendant's purchase of several A&P stores Fleming became the assignee to A&P's lease in the Ruskin Heights Center. "Thereby defendant acquired monopoly and economic power in the relevant product and geographic market by control of the essential facility in the Ruskin Heights Shopping Center." Complaint, Case No. 86-0161, at p.9. From the date of the assignment until the date the suits were commenced, defendant has not reopened the grocery store at the Ruskin Heights location. Instead, it is alleged that Fleming has refused to either reopen the store or to negotiate with a third party to assume operation of the anchor premises *and* has placed a sign on the closed store directing customers to the grocery store at the Longview Shopping Center. These acts are described as anticompetitive and as caus-

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1. Case No. 86-0161 was filed originally in this court and states claims under the Sherman Act. Case No. 86-0371 was a state court petition filed by the same plaintiffs alleging state antitrust and common law claims against Fleming. Fleming removed this petition to federal district court with subject matter jurisdiction premised on diversity of citizenship. The two actions were consolidated by order dated April 5, 1986, because "both cases apparently concern identical facts but present different theories of liability."

ing private injury to the other tenants of the Ruskin Heights Center. Specifically, "[b]y not leasing (renting) the vacated retail space to a viable anchor or magnet retail establishment, the Ruskin Heights Shopping Center is prevented from offering a full cluster of retail goods and services and is thereby deprived of the synergistic benefit of a shopping center location." *Id.* at p.11. Injunctive relief and damages are sought under both §§ 1 and 2 of the Sherman Act, 15 U.S.C. § 1 et seq. and the Missouri antitrust laws, RSMo. 416.031 et seq.

The *Henke* decision addressed an almost identical factual situation. Prior to November 1979, a Des Moines shopping center consisted of an anchor tenant grocery store and the plaintiff hardware store. The grocery store subsequently relocated to a nearby shopping center and assigned its space in the other center to a third party who agreed to refrain from leasing or subleasing the property "for the purposes of any general retail food store." Plaintiff hardware store's antitrust complaint alleged that defendant grocery store's actions constituted an unreasonable restraint of trade in violation of the Sherman Act. While acknowledging that the plaintiff was injured by defendant's efforts to prevent other food stores from operating at the first center, the Eighth Circuit agreed with the district court that the hardware store tenant had no standing to bring a private antitrust action. Plaintiff was neither a competitor, participant nor consumer within the retail grocery market; it did not suffer the kind of injury "that the antitrust laws were intended to prevent." 749 F.2d at 489. Moreover, plaintiff's damages attributable to defendant's anticompetitive conduct were "too speculative and uncertain to confer standing" since there may be a number of reasons why business at a par-

ticular shopping center decreases during a certain period of time. In sum, plaintiff was held to be an inappropriate party to maintain the antitrust action because of "the lack of antitrust-type injury, the presence of more appropriate parties, and the speculative nature of Henke's injuries." *Id.* at 490.

Plaintiffs here attempt to distinguish *Henke* on the basis that, in the present suit, the defendant did not relocate to another location but simply closed operations altogether at the Ruskin Heights Shopping Center. This factual distinction, however, has no bearing on the relationship of the injuries suffered by the tenants to the allegedly anticompetitive activities of the defendant in keeping the anchor location closed. As in *Henke,* plaintiffs in the present case are not competitors, participants, or consumers within the grocery business. "The only significant connection" between the plaintiff-tenants and the former A&P store "was one of proximity." *Henke,* 749 F.2d at 490. *Henke* is dispositive of plaintiffs' Sherman Act claims here and, therefore, dismissal under F.R.Civ.P. 12(b)(6) is required.[2]

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2. The court notes that an earlier suit was brought in this district by the owners of the Ruskin Heights Shopping Center against Fleming, asserting that Fleming had an agreement with the operator of the grocery store in the Longview Shopping Center to protect the latter's business by refusing to rent the leased premises in the Ruskin Heights location to a competing grocery store. Judge Clark dismissed this action (involving the same facts but different plaintiffs than the present suit) for lack of standing. Relying on a Sixth Circuit decision with facts "strikingly similar to the case at bar," *Southhaven Land Company, Inc. v. Malone & Hyde, Inc.,* 715 F.2d 1079 (1983), Judge Clark concluded that "[t]he complaint fails to aver that plaintiffs sustained any injury as competitors, purchasers, consumers or other economic actors in the grocery industry." *Block v. Fleming Companies, Inc.,* No. 83-0582-CV-W-4, slip op. (W.D.Mo. November 2, 1983).

The state law antitrust claims must also be dismissed under the *Henke* rationale. *See* RSMo. 416.141 ("Sections 416.011 to 416.161 shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes."). The petition in Case No. 86-0371 also includes common law claims for tortious interference with contract (Count III) and prima facie tort (Count IV). These counts presumably have an independent basis for subject matter jurisdiction - diversity of citizenship. Defendant Fleming is an Oklahoma corporation that removed the state court petition on the basis of diversity. Fleming's pending motion does not address these common law counts. While the court has some doubt about the applicability of these theories to the present alleged facts, no antitrust standing barrier exists as to these claims. Accordingly, it is hereby

ORDERED that all counts in Case No. 86-0161 (Sherman Act) and Counts I and II in Case No. 86-0371 (Missouri antitrust statutes) are DISMISSED because plaintiffs lack standing to bring these claims. It is further

ORDERED that defendant is directed to timely answer or otherwise respond to Counts III and IV of the petition in Case No. 86-0371 (tortious interference with contract and prima facie tort).

/s/ Howard F. Sachs
Howard F. Sachs
United States District Judge

DATED: May 7, 1986.

(Filed June 5, 1986)

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 86-0371-CV-W-6

RUSKIN CENTER SALON, et al.,
Plaintiffs,

v.

FLEMING COMPANIES, INC.,
a corporation,
Defendant.

ORDER

Defendant's motion to dismiss is founded on rather technical pleading theories based on state law that, if sound, would probably warrant a dismissal without prejudice so that plaintiffs could attempt to cure the defects. The counts in question turn, in large part, on defendant's intentions. While the prima facie tort claim alleges the conclusion that defendant acted with the intent to injure plaintiffs, the further allegations suggest, but do not plainly aver, that defendant acted for some economic reason of its own, to assist another grocery store with which it did business and not to harm plaintiffs.

Apart from issues raised by defendant in its motion, it seems likely that defendant could, by affidavit, explain

its conduct in a fashion that would allow summary judgment on the prima facie tort claim and (among other things) may raise justification as a matter of law on the tortious interference count.

The motion to dismiss is DENIED without prejudice but the court invites filing of a motion for summary judgment, properly supported.

/s/ Howard F. Sachs
Howard F. Sachs
United States District Judge

DATED: June 5, 1986.

(Filed June 16, 1986)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 86-0371 CV W-6

RUSKIN CENTER SALON, et al.,
Plaintiffs,

v.

FLEMING COMPANIES, INC.,
a corporation,
Defendant.

ANSWER

The defendant, Fleming Companies, Inc., for its answer to the petition (referred to in this Court by defendant as a "Complaint") states as follows:

1. Fleming denies each and every allegation of the Complaint except those allegations specifically admitted herein.

2. The Complaint fails to state a claim upon which relief can be granted.

3. Plaintiffs' claims are barred by the appropriate statute of limitations.

4. Fleming admits that in March, 1982, it obtained a lease in the Ruskin Heights Shopping Center by assignment from the Great Atlantic and Pacific Tea Company ("A&P") as part of a package of stores Fleming purchased from A&P.

5. Since obtaining the assignment of the lease, Fleming has complied with all provisions of the lease.

6. Although Fleming has actively sought to lease the premises to subtenants that were ready, willing, and able to carry on a magnet business, it has been unable to find a suitable subtenant willing to operate a business at the premises in question.

WHEREFORE, the defendant, Fleming Companies, Inc., prays that plaintiffs take nothing by way of their Complaint and that Fleming recovers its costs and a reasonable attorney's fee for defending this action.

/s/ Robert W. Dace
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Attorneys for Fleming Companies, Inc.

(Filed July 14, 1986)

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 86-0161-CV-W-6
No. 86-00371-CV-W-6
(Consolidated)

RUSKIN CENTER SALON, et al.,
Plaintiffs,

v.

FLEMING COMPANIES, INC.,
Defendant.

ORDER

Pursuant to Local Rule 15 (G) the parties have filed their proposed scheduling order. The order is hereby adopted by the court. All pretrial discovery should be completed on or before March 2, 1987. SO ORDERED. It is further

ORDERED that

1. The parties are to file witness and exhibit lists on or before March 9, 1987. Lists shall include all potential witnesses and exhibits except those to be used for the sole purpose of unanticipated rebuttal or impeachment.

2. The parties are to meet on or before March 16, 1987, produce each of their exhibits for inspection and agree on all exhibits for which objection will be waived as to admissibility on the ground of lack of identification.

3. The parties are to meet on or before March 16, 1987, and agree upon a proposed pretrial order containing the following:

a. a statement of the nature of the action, including a designation of the parties and a list of the pleadings raising the issues.

b. a statement of the facts and legal authority upon which federal jurisdiction is based.

c. a stipulation of uncontroverted facts.

d. a list of reservations by any party to the stipulation of uncontroverted facts.

e. a list of facts that, although not admitted, are not to be contested at trial by evidence to the contrary.

f. a list of exhibits to be offered at trial, other than those to be used for impeachment, in the sequence proposed to be offered, with a description of each sufficient for identification, and a statement of all admissions by and all issues between any of the parties as to the genuineness thereof, and the truth of relevant matters of fact set forth therein or in any legend affixed thereto, together with a statement of any objections reserved as to the admissibility in evidence thereof.

In addition, the parties are strongly encouraged, although not required, to include in the proposed pretrial order a statement of factual and legal issues remaining to be litigated.

4. The parties are to submit the proposed pretrial order on or before March 27, 1987. If agreement is impossible, separate pretrial orders should not be filed, but any disputes concerning the proposed order should be set forth in the proposed pretrial order.

/s/ Howard F. Sachs
Howard F. Sachs
United States District Judge

DATED: 7-14, 1986.

(Filed March 9, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 86-0371-CV W-6

RUSKIN CENTER SALON, et al.,
Plaintiffs,

v.

FLEMING COMPANIES, INC.,
Defendant.

WITNESS AND EXHIBIT LISTS OF DEFENDANT, FLEMING COMPANIES, INC.

Comes now the defendant Fleming Companies, Inc., pursuant to the Court's discovery order of July 14, 1986 and submits its witness and exhibit lists.

A. WITNESS LIST OF DEFENDANT, FLEMING COMPANIES, INC.

1. Matthew G. Jonas, Division President, Fleming Companies, Inc., 1100 Atlantic Avenue, North Kansas City, Missouri 64116.

2. Byron E. Duffield, 11414 North 54th Place, Scottsdale, Arizona 85254.

3. Donald G. Boos, Store Development Manager, Fleming Companies, Inc., 1100 Atlantic Avenue, North Kansas City, Missouri 64116.

4. James Tapp, Regional Real Estate Director, Fleming Companies, Inc., Two Townsite Plaza, Topeka, Kansas.

5. Martin Hugo, Real Estate Dynamics, 406 West 34th Street, VFW Building, Kansas City, Missouri 64111.

6. Tom Miller, Larry's United Super, 6859 Longview Road, Kansas City, Missouri.

7. Jim Tracy, Thriftway Grocery Store, Belton, Missouri.

8. James P. Tierney, 2600 Mutual Benefit Life Building, 2345 Grand Avenue, Kansas City, Missouri 64106.

9. Larry Ervin, Larry's United Super, 6859 Longview Road, Kansas City, Missouri.

10. Allen David, Fleming Companies, Inc., Two Townsite Plaza, Box 1160, Topeka, Kansas 66601.

11. Scott Womoski or another representative of Associated Wholesale Grocers, Kansas City, Kansas.

12. Expert witnesses to be identified.

13. Plaintiffs.

14. All witnesses listed by plaintiffs and identified by plaintiffs in their interrogatory answers.

15. Representatives of all tenants in the Ruskin Heights Shopping Center.

B. EXHIBIT LIST OF DEFENDANT, FLEMING COMPANIES, INC.

1. Letter dated March 31, 1982 from James Baska to Ruskin Heights Associates.

2. Letter dated April 1, 1982 from Don Boos to various real estate brokers with attached brochure.

3. Letter dated April 5, 1982 from David Block to Don Boos.

4. Letter dated April 6, 1982 from Richard Moseley to Don Boos.

5. Memorandum dated April 6, 1982 from Don Boos to Byron Duffield.

6. Letter dated April 8, 1982 from Kirby Deeter to Don Boos.

7. Letter dated April 15, 1982 from Todd Goodman to Don Boos.

8. Letter dated April 15, 1982 from Richard Moseley to Don Boos.

9. Memorandum dated April 16, 1982 from Don Boos to Byron Duffield.

10. Letter dated April 19, 1982 from Todd Goodman to Don Boos.

11. Letter dated May 7, 1982 from Richard Moseley to Don Boos.

12. Letter dated May 12, 1982 from Richard Moseley to Don Boos.

13. Memorandum from Don Boos to Byron Duffield dated May 17, 1982.

14. Letter dated July 16, 1982 from Leon Eisenberg & Co.

15. Letter dated July 20, 1982 from Stuart E. Davis to Don Boos.

16. Letter dated August 3, 1982 from Henry Robertson to Richard F. Moseley.

17. Letter dated August 6, 1982 from Richard F. Moseley of Moseley & Co. to Don Boos.

18. A&P conversion report dated October 6, 1982 (two pages).

19. Memorandum dated October 6, 1982 from Byron Duffield to Don Boos.

20. Letter dated October 28, 1982 from Anthony Agee to Don Boos.

21. Letter dated November 3, 1982 from Don Boos to Henry Robertson.

22. Document entitled "Notes on sublease - Hancock Fabrics - Ruskin Heights" dated January 6, 1983.

23. Memorandum dated January 19, 1983 from Don Boos to Byron Duffield.

24. Letter dated January 25, 1983 from Byron Duffield to Bob Smith.

25. Memorandum dated January 26, 1983 from Don Boos to Byron Duffield.

26. Memorandum dated February 28, 1983 from Don Boos to Byron Duffield.

27. Letter dated March 3, 1983 from Don Boos to Byron Duffield.

28. Memo to file on Ruskin Heights dated March 4, 1983.

29. Memorandum dated March 16, 1983 from Don Boos to Byron Duffield.

30. Letter dated April 7, 1983 from Leo Eisenberg & Co. to Don Boos.

31. Letter dated April 14, 1983 from Byron Duffield to Allen David.

32. Sublease Agreement between Fleming Companies, Inc. and A & S Enterprises, Inc. dated May, 1983.

33. Letter dated May 17, 1983 from Don Boos to Henry Robertson.

34. Letter dated June 6, 1983 from Don Boos to Allen David.

35. Letter dated September 16, 1983 from Don Boos to Byron Duffield.

36. Document entitled "Closed Store Report" dated September 29, 1983.

37. Letter dated November 7, 1983 from Martin Hugo to Allen Block.

38. Letter dated November 11, 1983 from Byron Duffield to Martin Hugo.

39. Letter dated November 14, 1983 from Ed Jones to Martin Hugo.

40. Letter dated November 21, 1983 from Martin Hugo to Sam Westbrook.

41. Letter dated November 21, 1983 from Ed Jones to Martin Hugo.

42. Letter dated November 22, 1983 from Martin Hugo to Ed Jones.

43. Letter dated December 16, 1983 from David Block to Byron Duffield.

44. Letter dated March 16, 1984 from Martin Hugo to Beth Fairleigh.

45. Letter dated March 24, 1984 from Martin Hugo to Mike Gebaur.

46. Letter dated March 28, 1984 from Martin Hugo to Beth Farleigh.

47. Sublease Agreement between Fleming Companies, Inc. and Aldi, Inc. dated April 1, 1984.

48. Letter dated April 3, 1984 from Martin Hugo to Don Boos.

49. Letter dated April 4, 1984 from Martin Hugo to Todd Nielson.

50. Letter dated April 12, 1984 from Martin Hugo to Byron Duffield.

51. Letter dated April 20, 1984 from Martin Hugo to Byron Duffield.

52. Letter dated April 27, 1984 from Martin Hugo to Todd Nielson.

53. Letter dated May 1, 1984 from James Tapp to Martin Hugo.

54. Letter dated June 21, 1984 from Martin Hugo to Kenneth Stolfus.

55. Letter dated June 26, 1984 from Martin Hugo to Byron Duffield.

56. Letter dated May 3, 1984 from Martin Hugo to Todd Nielson.

57. Letter dated May 8, 1984 from Martin Hugo to Beth Fairleigh.

58. Letter dated May 21, 1984 from Martin Hugo to Kenneth Stolfus.

59. Letter dated June 26, 1984 from Martin Hugo to Byron Duffield.

60. Letter dated July 19, 1984 from James Tapp to Martin Hugo with attached sublease for T.K. Enterprises.

61. Letter dated October 2, 1984 from Martin Hugo to Jeffrey Scott.

62. Letter dated October 15, 1984 from Martin Hugo to Don Boos.

63. Letter dated October 17, 1984 from Don Boos to Martin Hugo.

64. Letter dated October 17, 1984 from Rod McCubbin to Don Boos.

65. Letter dated October 30, 1984 from Martin Hugo to Timothy and Robin Goodale.

66. Letter dated November 12, 1984 from Martin Hugo to Ken Zagnoni.

67. Letter dated November 15, 1984 from Martin Hugo to Audley Porter.

68. Letter dated December 3, 1984 from Martin Hugo to Dana Hickman.

69. Letter dated December 12, 1984 from Byron Duffield to Don Boos.

70. Letter dated December 12, 1984 from Martin Hugo to Mr. and Mrs. Timothy Goodale.

71. Letter dated January 21, 1985 from Martin Hugo to James Tapp.

72. Letter dated January 21, 1985 from James Tapp to Timothy J. Goodale.

73. Letter dated February 1, 1985 from Martin Hugo to C.J. Naudet.

74. Advertising Contract between Real Estate Dynamics and the Kansas City Business Journal dated February 4, 1985.

75. Classified advertisement in the Kansas City Business Journal week of February 4, 1985.

76. Letter dated February 15, 1985 from Martin Hugo to Timothy J. Goodale.

77. Letter dated February 15, 1985 from Martin Hugo to Stan Shaver.

78. Letter dated February 21, 1985 from Martin Hugo to Stan Shaver.

79. Letter dated February 25, 1985 from Jim Tapp to Byron Duffield.

80. Letter dated March 28, 1985 from Martin Hugo to James Tapp.

81. Letter dated April 11, 1985 from Martin Hugo to Don Boos.

82. Letter dated April 23, 1985 from Martin Hugo to Byron Duffield.

83. Letter dated September 5, 1985 from Martin Hugo to George Hanch.

84. Letter dated January 10, 1986 from Martin Hugo to W. E. Shaw.

85. Letter dated October 1, 1985 from Martin Hugo to James Tapp.

86. Letter dated February 4, 1986 from James Tapp to W.L. Peterson.

87. Copies of checks dated February 5, 1986 from Sleep Center Furniture Special Account to Fleming Company, Inc.

88. Certificate of Insurance from Liberty Mutual Insurance Company dated February 10, 1986.

89. Letter dated February 10, 1986 from Martin Hugo to Jim Tapp.

90. Letter dated February 10, 1986 from Martin Hugo to Don Boos.

91. Letter dated April 22, 1986 from Gene Moffitt to Martin Hugo.

92. Letter dated May 14, 1986 from George Hammontree to Steven Shearer.

93. Letter dated May 28, 1986 from Martin Hugo to Steven Shearer.

94. Sublease Agreement between Fleming Companies and Aldi, Inc.

95. Fleming's Lease amendments and assignment for its space in the Ruskin Heights Shopping Center.

96. All documents produced by plaintiffs.

97. Sublease Agreement between Fleming Companies, Inc. and the Southside Kansas City Optimist Club.

98. Addendum to Sublease Agreement between Fleming Companies, Inc. and the Southside Kansas City Optimist Club.

99. Sublease proposal from T.K. Enterprises, Inc.

100. Sublease Agreement between Fleming Companies, Inc. and T & R Animal Kingdom, Inc.

101. Charts summarizing attempts to sublet the premises at the Ruskin Heights Shopping Center.

102. Charts regarding Fleming's purchase of grocery stores in the Kansas City area from the Great Atlantic & Pacific Tea Company.

103. Plaintiffs' financial records

104. Plaintiffs' tax returns

105. Photographs of the Ruskin Heights Shopping Center.

106. Discovery responses of plaintiffs

107. Maps of the area around the Ruskin Heights Shopping Center.

108. Leases of plaintiffs

109. Demographic profile of the area surrounding Ruskin Heights Shopping Center.

110. Advertisements placed in an attempt to sublease the premises.

111. Survey and supporting documents concerning the suitability of the Ruskin Heights Shopping Center as a location for a grocery store.

112. All documents produced to plaintiffs.

113. Worksheets of Byron Duffield on which he made the financial analysis and determination that it was uneconomical to reopen the store at the Ruskin Heights Shopping Center

114. Charts summarizing information in other documents.

115. Charts to be utilized by defendant's expert witness.

116. All of plaintiffs' exhibits not objected to by defendant.

/s/ Robert W. Dace
Reid E. Robison
Robert W. Dace
Tenth Floor, Two Leadership Square
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-9621

OF COUNSEL:

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/s/ Thomas J. Wheatley
Thomas J. Wheatley
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2345 Grand Avenue
Kansas City, Missouri 64108
Telephone: (816) 842-0820

OF COUNSEL:

Lathrop Koontz & Norquist
2600 Mutual Benefit Life Building
2345 Grand Avenue
Kansas City, Missouri 64108
Telephone: (816) 842-0820

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 1987, a true and correct copy of the above and foregoing Witness and Exhibit Lists of Defendant, Fleming Companies, Inc. was mailed, postage prepaid thereon, to:

Eugene J. Feldhausen
10220 N. Executive Hills Boulevard
Suite 600
Kansas City, Missouri 64153

/s/ Thomas J. Wheatley
Thomas J. Wheatley

(Filed March 13, 1987)

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 86-0371-CV-W-6

RUSKIN CENTER SALON, et al.,
Plaintiff,

vs.

FLEMING COMPANIES, INC.,
Defendant.

SECOND AMENDED EXHIBIT LIST

COME NOW, Plaintiffs, and file the following Exhibit List including all potential exhibits except those to be used for the sole purpose of unanticipated rebuttal or impeachment:

"A" Listed documents that were filed in the Case No. 83-0582-CV-W-924, *David M. Block, et al v. Fleming Companies, Inc.* in the United States District Court for the Western District of Missouri, Western Division.

(1) Complaint;

(2) Brief in Support of Motion to Dismiss of Fleming Companies, Inc.;

(3) Brief in Opposition to Motion to Dismiss;

(4) Defendant's First Set of Interrogatories and Request for Production;

(5) Reply Brief in Support of Motion to Dismiss of Fleming Companies, Inc.;

(6) Plaintiff's Reply Brief in Opposition to Defendant's Motion to Dismiss;

(7) Plaintiff's Answers to Defendant's First Set of Interrogatories;

(8) Order dated November 2, 1983.

"B" (1) One page letter dated April 12, 1982 to Byron Duffield from David Block;

(2) Three page letter dated August 19, 1983, to John R. Cleary, Esq., Linde, Thomson, et al., from Reid E. Robison, Re: David M. Block, et al. v. Fleming Companies, Inc.;

(3) One page letter dated June 27, 1986 to Matt Jonas, Fleming Foods Company from David M. Block;

(4) Two page letter dated June 30, 1986 to David M. Block, Re: Leased Premises, 11154 Blue Ridge, Kansas City, from Matthew G. Jonas;

(5) One page letter dated August 5, 1986, to David Block, Block & Company, Inc., Re: Former A&P Grocery Store, Ruskin Heights Shopping Center, Kansas City, Missouri from Martin A. Hugo, Jr., President, Real Estate Dynamics, Inc.

"C" The original sign placed in a window in the closed A&P store in the Ruskin Heights Shopping Center.

"D" Documents relevant to negotiations for the lease of premises by Ron Bowes and Tim Rousch.

"E" Plat and pictures of Ruskin Center at various times relevant to the litigation.

"F" Documents relevant to Plaintiffs computation of damages.

"G" The entire documents as specified as numbers 1-62 in Defendant's Response to Plaintiff's First Request for Production dated December 8, 1986.

"H" Newspaper article appearing in the Kansas City Star on Sunday, January 25, 1987 titled "Eisenburg Plans Center In Raytown".

"I" Plaintiff's Depositions.

"J" The sublease between Defendant and the present tenant of the original vacated space in the Ruskin Shopping Center.

"K" The entire Plaintiff file including exhibits attached in cases #86-0161-CV-W-6 and #86-0371-CV-W-6 (consolidated).

"L" Letter dated February 4, 1983 to David M. Block from Phillip C. Bird

"M" Letter dated April 22, 1983 to David M. Block from Charles C. Oliver, Jr.

"N" Letter dated April 21, 1983 to David Block from Donald N. Thellman.

Feldhausen & Burke,
/s/ Eugene J. Feldhausen
Eugene J. Feldhausen, #16854
10220 North Exec. Hills Blvd.
Suite 600
Kansas City, Missouri 64153
(816) 891-2500
Attorney for Plaintiff

Certificate of Mailing

I hereby certify that a copy of Plaintiff's Amended Exhibit List was mailed, postage prepaid, certified mail, return receipt requested, this 12th day of March, 1987, to Reid E. Robison and Robert W. Dace, 10th Floor, Two Leadership Square, Oklahoma City, Oklahoma 73102 and a copy by U.S. mail, postage prepaid to Thomas J. Wheatley, 2600 Mutual Benefit Life Building, 2345 Grand Avenue, Kansas City, Missouri 64108.

/s/ Eugene J. Feldhausen
Eugene J. Feldhausen

(Filed March 13, 1987)–

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF MISSOURI
WESTERN DIVISION

No. 86-0371-CV-W-6

RUSKIN CENTER SALON, et al.,
Plaintiff,

vs.

FLEMING COMPANIES, INC.
Defendant.

AMENDED WITNESS LIST

COMES NOW Plaintiffs, and file the following Witness List including potential witnesses except those to be used for the sole purpose of unanticipated rebuttal or impeachment:

1. Louis Angotti, Jr., 608 N.E. County Lane, Lee's Summit, MO 64063; 11152 Blue Ridge Blvd., Kansas City, MO; owner, Ruskin Sentry Hardware; other positions, business affiliations and job descriptions are unknown to Plaintiffs.

2. Samual R. Scarcello, 49 Lone Pine Dr., Cleveland, MO; owner of the Ruskin Heights Barber Shop, 11128 Blue Ridge Extension, Kansas City, MO 64134; other positions, business affiliations and job descriptions of Mr. Scarcello are unknown to Plaintiffs.

3. Robert O. Smith, 113 Teakwood, Lee's Summit, Mo; employed by the Drug Store, Inc., 11118 Blue Ridge Blvd., Kansas City, MO 64134; other positions, business affiliations and job descriptions are unknown to Plaintiffs.

4. Tom Miller; Larry's United Super, 6859 Longview Road, Kansas City, MO; position with Larry's United Super unknown; previously manager of A&P Grocery Store, Ruskin Heights Shopping Center.

5. Mr. Charles Givens, 10313 Crystal, Kansas City, MO 64134; business affiliations unknown.

6. Ron Bowes, address unknown; business affiliation with Kansas City area food stores, exact locations presently unknown.

7. Ken Zagnoni, 9805 W. 101 Street; position with Leo Eisenberg, Co., 800 Mercantile Tower, Kansas City, MO; other positions, business affiliations and job descriptions are unknown to Plaintiffs.

8. Steve E. Caffey, 13629 Bennington, Grandview, MO 64030; Vice President of Block & Company, Inc., 605 W. 47th Street, Kansas City, MO; other positions, business affiliations and job descriptions are unknown to Plaintiffs.

9. Ed F. Jones, 10415 Oakland, Kansas City, MO 64134; Block & Company, Inc., 605 W. 47th Street, Kansas City, MO 64134; Project Manager for Ruskin Heights Shopping Center; other positions, business affiliations and job descriptions are unknown to Plaintiffs.

10. Mr. Ernie Franke, home address unknown; employee of Larry's United Super 6839 Longview Road, Kansas City, MO; other positions, business affiliations and job descriptions are unknown.

11. Mr. Joe Cusimano, home address unknown; employee of Larry's United Super 6839 Long View Road, Kansas City, MO; other positions, business affiliations and job descriptions are unknown.

12. Ed Lewis, home address unknown; employee of U.S. Super, 94th and Blue Ridge, Kansas City, MO; other positions, business affiliations and job descriptions are unknown.

13. Mr. John McCormick, present home address and employer unknown; it is believed that he is a Vice President of U.F. C.W. Union Local 576; other positions, business affiliations and job descriptions are unknown.

14. Mr. & Mrs. Morton Singer, 10301 Horton, 11124 Blue Ridge, Kansas City, MO; owners of Singer Jewelry; previous positions set out in their depositions taken by Defendant on September 11, 1986.

15. Sam & Helen McKee, home address unknown; owners of Supreme Cleaners, 11114 Blue Ridge, Kansas City, MO 64134; previous business positions unknown.

16. Leroy E. Kendrick, home address and business address unknown.

17. Phillip C. Bird, home address unknown; last known business affiliation, Vice President, Banco Mortgage Co., 11111 W. 95th Street, Suite 202, Overland Park, Kansas 66204; previous business positions unknown.

18. Charles C. Oliver, Jr., home address unknown; last known business affiliation, President, United Kansas Bank & Trust, 8600 W. 63rd, Shawnee Mission, Kansas 66201; previous business positions unknown.

19. Donald N. Thellman, home address unknown; last known business affiliation, Vice President, Don J. McMurray Co., Division of Rothschild Financial Corp., 4140 Broadway, Kansas City, MO 64111; previous business positions unknown.

20. David M. Block, home address unknown; President, Block & Co., 605 W. 47th, Suite 100, Kansas City, MO 64112; previous business positions unknown.

21. Martin Hugo, home address unknown; Real Estate Dynamics, 406 W. 34th Street, VFW Bldg., Kansas City, MO 64111; previous business positions unknown.

22. Tim Roush, 838 Trott Road, Rural Route 2, Belton, MO.

23. James R. Tracy, Thriftway Store, Belton, MO.

24. Guy Vincent, 11205 Eastern, Kansas City, MO.

25. Joseph G. Anderson, 207 Skyview Drive, Raymore, MO.

26. Urban Neff, 11409 Oakland, Kansas City, MO 64134.

27. Ibal Pruter, 10416 Oakland, Kansas City, MO 64134.

28. Robert E. Palmer, 11813 Beacon Ave., Kansas City, MO 64134.

29. Jack Batson, 7118 E. 107th, Kansas City, MO 64134

30. Gary Laird, Our Own Hardware Company, Box 720, Minneapolis, MN.

31. Henry Schulteis, address unknown; attorney.

32. Byron Duffield; officer of Defendant.

33. John Merrin, address unknown.

34. Wesley Charles Jerge; auto swap store, Ruskin Heights Center.

35. Micah Feingold; Leo Eisenberg Company, Kansas City, MO.

36. Mr. Sheridan Morgan; attorney for Plaintiff; Morris, Larson, King, Stamper & Bold, 400 Two Crown Center, 2420 Pershing Road, Kansas City, MO 64108.

Feldhausen & Burke,
/s/ Eugene J. Feldhausen
Eugene J. Feldhausen, #16854
10220 North Exec. Hills, Blvd.
Suite 600
Kansas City, Missouri 64153
(816) 891-2500
Attorney for Plaintiff

Certificate of Mailing

I hereby certify that a copy of Plaintiff's Witness List was mailed, prepaid, certified mail, return receipt requested, this 12th day of March, 1987, to Reid E. Robison and Robert W. Dace, 10th Floor, Two Leadership Square, Oklahoma City, Oklahoma 73102 and a copy by U.S. mail, postage prepaid to Thomas J. Wheatley, 2600 Mutual Benefit Life Building, 2345 Grand Avenue, Kansas City, Missouri 64108.

/s/ Eugene J. Feldhausen
Eugene J. Feldhausen

FELDHAUSEN & BURKE, P.C.
Executive Hills North
10220 N. Executive Hills
EUGENE J. FELDHAUSEN Suite 600 (816) 891-2500
MICHAEL BURKE Kansas City, MO 64153

April 14, 1987

Honorable Howard F. Sachs
United States District Court
United States Courthouse
811 Grand Avenue
Room 443
Kansas City, Missouri 64106

Re: Ruskin Center Salon vs. Fleming Companies, Inc.
No. 86-037-CV-W-6

Dear Judge Sachs:

In accordance with the Court Order dated July 14, 1986 the parties to the above matter were to meet Thursday, April 9, 1987. The parties met in accordance with that Order. Counsel for all parties have agreed to Stipulate to the Court that the response date for the material covered by the Order be extended to May 15, 1987. We therefore request the Court's permission for an extension of time to file the pretrial Order in the above matter. A copy of a proposed Order is enclosed.

Respectfully,

/s/ Eugene J. Feldhausen
Eugene J. Feldhausen

EJF/peg

Enclosure

cc: Mr. Robert W. Dace
Mr. Thomas J. Wheatley
Mr. Sheridan Morgan

(Filed April 27, 1987)

IN THE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 86-0371-CV-W-6

RUSKIN CENTER SALON, et al.,
Plaintiffs,

v.

FLEMING COMPANIES, INC.,
Defendant.

ORDER

Plaintiffs in this action are various tenants in the Ruskin Heights Shopping Center. Defendant Fleming Companies, Inc. (Fleming) is the assignee of the lease of the premises formerly occupied by the center's one-time "anchor tenant," the A&P store. Since 1982, when it became A&P's assignee as part of a package purchase of several A&P stores, defendant Fleming has paid the rent on the Ruskin Center lease but has neither operated a business in that space nor sublet the space to any other business. Plaintiffs have brought suit against Fleming, alleging that Fleming's decision to maintain this space without an anchor tenant is prima facie tortious conduct and constitutes, additionally, a tortious interference with their valid business relationship (presumably with the

lessor) or expectancy that an anchor tenant would remain in the center.[1] Now pending before the court is defendant's motion for summary judgment on Counts III and IV.

ARGUMENTS

Defendant supports its motion for summary judgment on Count III, plaintiffs' claim of tortious interference with business relationship or expectancy, by arguing that plaintiffs had, at best, a hope that their landlord would maintain an anchor tenant in the center, as there is no such provision in any of the parties' leases. A hope is not a legally protected expectancy, it asserts. Fleming further argues that even if there was a legally cognizable expectancy, Fleming did not know of it at the time the decision was made to keep the space vacant. At the earliest, Fleming argues, it learned of the expectancy when the lessor filed suit against it in 1983 based on these same facts.[2] Therefore, it could have had no intention of interfering with plaintiffs' relationship with lessor or their expectancy when its decision was made. In any event, Fleming contends that it was justified in its actions because they were prompted by its own valid financial interests. Defendant points out that it is not required by its lease to maintain a business in the leased premises. Further, by affidavit of Byron Duffield, who

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1. On May 7, 1986, the court dismissed plaintiffs' claims of state and federal antitrust law violations under Counts I and II of the complaint, due to plaintiffs' lack of standing to bring the claims. Remaining are Count III for tortious interference with contract or business relationship or expectancy and Count IV for prima facie tort.

2. *Block v. Fleming Companies, Inc.*, No. 83-0582-CV-W-9 (W.D. Mo. filed May 20, 1983).

was president of defendant's Kansas City division at the time the decision was made not to reopen the grocery store after A&P's departure, defendant informs the court that a detailed analysis of the financial prospects of a continuing grocery operation there was made prior to its closure. That analysis revealed, in sum, that Fleming's short term rent losses "until [the] space was sublet" would be less than the losses in accounts receivable and note financing which it could expect if the grocery were to remain open under new owners. Defendant's Motion for Summary Judgment, Exhibit A. Plaintiffs themselves have submitted supplemental interrogatory answers which detail defendant's efforts to sublet the premises to other tenants. Plaintiffs' Suggestions in Opposition to Defendant's Motion for Summary Judgment, Exhibit B. The protection of its legitimate business interests, defendant argues, provides ample justification for its actions.

Plaintiffs respond that a protected expectancy need not be a contractual provision and that they had been assured by the landlord of a "continuously operating anchor or magnet tenant." Complaint at 13. They support this by their own deposition testimony and refer the court to their complaint for the facts supporting their allegations of tortious interference. Plaintiffs claim that the filing of the lessor's suit in May 1983, served as notification of their expectancy of a continuing relationship. They press for a finding of constructive intent, since the harm plaintiffs allege is the "necessary and direct consequence" of defendant's acts which were "manifestly likely" to cause them damage. Suggestions in Opposition at 7. Finally, plaintiffs contend that the question of justification for defendant's actions may not be judged from defendant's own subjective view of its best financial interests but is an

issue to be objectively determined, taking into account the societal effects of defendant's conduct:

> The issue in this matter is not Defendant's obligations under the lease nor Defendant's perception of what is in its best financial interest. The issues are whether Defendant's subsequent conduct, particularly as it effects [sic] third parties, such as consumers and retail businesses, is societally acceptable. . . .

Suggestions in Opposition at 12.[3] Plaintiffs contend that defendant's actions reduced competition and "impaired consumer preference" and that its acts were an "unlawful restraint of trade."

In support of its motion for summary judgment on Count IV, plaintiffs' claim of prima facie tort, defendant contends that it intended no injury to plaintiffs and that its actions were justified, being taken strictly for legitimate business purposes. Defendant points out that plaintiffs have not adduced any evidence to support their contention that defendant intended to injure them and in fact admit in deposition that they have no such evidence. Motion for Summary Judgment at 7.

Plaintiffs respond once again that defendant's intent may be inferred because "defendant is charged with the intent for the end result which is the necessary and direct consequence of his conduct." Suggestions in Opposition at 11. Both parties repeat here their earlier justification arguments.

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3. Specifically defendant's subsequent conduct plaintiffs complain of was its insistence upon a dismissal of the lessor's lawsuit against it arising from these same facts in return for its surrender of the leasehold to the lessor.

LEGAL STANDARDS

The standards for summary judgment have recently been elucidated by the United States Supreme Court:

> Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."
>
> . . .
>
> In essence . . . the inquiry . . . [is] whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2511-12 (1986).

> The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1986). Such a showing

> requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Id.

In considering the facts and arguments set out above in the light of these standards, the court finds that the evidence is so one-sided in this case as to require that defendant must prevail; summary judgment is appropriate and will be granted on both counts.

TORTIOUS INTERFERENCE WITH CONTRACT OR BUSINESS RELATIONSHIP OR EXPECTANCY

The elements which plaintiffs must prove in order to succeed on their claim of tortious interference are (1) a contract, or valid business relationship or expectancy; (2) defendant's knowledge of the contract or relationship; (3) intentional interference by the defendant inducing or causing a breach of the contract or relationship; (4) absence of justification; (5) damages resulting from defendant's acts. *Institutional Food Marketing v. Golden State Strawberries,* 747 F.2d 448 (8th Cir. 1984) (construing Missouri law). Although the court has serious doubts about other elements of plaintiffs' case, it will address only the issue of justification, since the failure of the action as to this element alone spells failure for the entire theory.[4]

The burden of proving an absence of justification is borne by plaintiff. *Francisco v. Kansas City Star Co.,* 629 S.W.2d 524 (Mo. Ct. App. 1981). These plaintiffs do not contest defendant's factual claim that it acted in its own financial interests but argue that this motive cannot provide a basis for a finding of justification.

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4. For instance, given the fact that the relationship between each of the plaintiffs and their landlord-lessor was governed by contract, none of which provided for the continuous presence of an anchor tenant, the court questions whether plaintiffs' expectation that such a tenant would always remain rises to the level of a valid expectation which the law will protect. While it is true that relationships may be protected in the absence of a contract, it is presumed that where a contract does exist, its terms will contain all the duties and benefits obtaining between the parties.

Plaintiffs' argument that defendant's acts are unjustified because they violated the Sherman Antitrust Act must be rejected. Plaintiffs' claims based on antitrust violations were dismissed from this suit several months ago and clearly cannot be determined on this motion. Thus, they cannot serve as a basis for a claimed lack of justification.

Plaintiffs' argument that defendant's acts must be judged objectively, so as to coincide with society's best interests, is without merit. Missouri courts have held that "where one has a bona fide legal economic interest to protect, that party is privileged to prevent performance of a contract which threatens that bona fide legal economic interest." *Francisco,* 629 S.W.2d at 534; *Solomon v. Crown Life Insurance Co.,* 536 F.2d 1233 (8th Cir. 1976), *cert. denied,* 429 U.S. 961 (1976); *see also Minnesota Mining & Manufacturing Co. v. Williamson,* 675 S.W.2d 951 (Mo. Ct. App. 1984); *Pillow v. General American Life Insurance Co.,* 564 S.W.2d 276, 282 (Mo. Ct. App. 1978). While the law recognizes an exception to this rule for behavior that is inherently improper, there is a complete lack of evidence of such behavior in this case. Defendant was performing according to the terms of its own lease, which specifically allowed it to keep the premises vacant. Plaintiffs have failed to carry their burden of proof as to this necessary element of their cause of action for tortious interference with contract or business relationship.

PRIMA FACIE TORT

Similarly, plaintiffs' claim of prima facie tort must fail. The elements which constitute plaintiffs' burden of proof on this claim are (1) an intentional lawful act by defendant; (2) defendant's intent to cause injury to plain-

tiff; (3) actual injury to plaintiff; (4) absence of any justification or insufficient justification for defendant's act. *Porter v. Crawford & Co.*, 611 S.W.2d 265 (Mo. Ct. App. 1980). As plaintiffs failed to carry their burden of proof on the issue of lack of justification for tortious interference with contract, so they have failed to carry their burden on this theory of recovery, and for the same reasons. Further, although, as plaintiffs suggest, intent may sometimes be inferred from the fact that a tortfeasor is held to account for the natural and probable consequences of his actions, Missouri law as to this particular tort is to the contrary; the intent must be specific. *Rooney v. National Super Markets, Inc.*, 668 S.W.2d 649 (Mo. Ct. App. 1984); *Bandag of Springfield, Inc. v. Bandag, Inc.*, 662 S.W.2d 546 (Mo. Ct. App. 1983) ("Inasmuch as the record shows beyond cavil that the defendant had only a profit motive . . . the element of intentionally seeking to injure plaintiffs, essential to a cause of action for prima facie tort, is lacking."). Plaintiffs have failed to produce any evidence whatever that defendant intentionally acted to injure them. Summary judgment on this count is appropriate, as well. It is, therefore,

ORDERED that defendant's motion for summary judgment on Counts III and IV is GRANTED.

/s/ Howard F. Sachs
Howard F. Sachs
United States District Judge

DATED: 4-27, 1987.

SHERMAN ACT NO. 1

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to introstate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on

conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court.

July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

SHERMAN ACT NO. 2

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

JURISDICTION OF COURTS

§ 4. Jurisdiction of courts; duty of United States attorneys; procedure

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

July 2, 1890, c. 647, § 4, 26 Stat. 209; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 25, 1948, c. 646, § 1, 62 Stat. 909.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate

commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.